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LORETTA SCHENKL,

Appellee,

vs.

HEFFIELD THEATRE COMPANY, a
corporation, and ESSAESS
HEATRES CORPORATION, a cor-
poration,

Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

291 I.A. 603¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action at law for personal injuries through alleged negligence of defendants, and upon trial by jury, there was a verdict in favor of plaintiff and damages assessed at \$22,000. Defendants made a motion for a new trial. The court required a mittitur of \$10,000, and upon the entrance of it overruled the motion and entered judgment in favor of plaintiff in the sum of \$2,000, to reverse which defendants appeal..

It is contended for reversal that an instruction in defendants' favor requested at the close of all the evidence should have been given because as a matter of law defendants were not guilty of negligence, because, assuming negligence by defendants, plaintiff was guilty of contributory negligence, and because the negligence assumed was not the proximate cause of plaintiff's injury. It is also contended that the judgment should be reversed because it is against the manifest weight of the evidence, because a new trial was not granted, because the court erred in the admission and exclusion of evidence and in the giving and refusing of instructions, because the verdict was the result of passion and prejudice, because the court erred in submitting the first and second counts of the complaint to a jury, and because of prejudicial conduct of the trial Judge and counsel for plaintiff and plaintiff herself during the course of the trial.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

221 I.A. 603

APPELLEE

vs.

APPELLANTS

MR. PRESIDING JUSTICE WATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action at law for personal injuries through alleged

negligence of defendants, and upon trial by jury, there was a

verdict in favor of plaintiff and damages assessed at \$25,000.

Defendants made a motion for a new trial. The court refused a

rehearing of \$10,000, and upon the entrance of its order the

plaintiff and entered judgment in favor of plaintiff in the sum of

\$25,000, to reverse which defendants appeal.

It is contended for reversal that an instruction in de-

endants' favor requested at the close of all the evidence should

have been given because as a matter of law defendants were not guilty

of negligence, because, assuming negligence by defendants, plaintiff

was guilty of contributory negligence, and because the negligence

claimed was not the proximate cause of plaintiff's injury. It is

also contended that the judgment should be reversed because it is

against the manifest weight of the evidence, because a new trial

was not granted, because the court erred in the admission and ex-

clusion of evidence and in the giving and refusing of instructions,

because the verdict was the result of passion and prejudice, because

the court erred in admitting the first and second cause of the

complaint to a jury, and because of prejudicial conduct of the

trial judge and counsel for plaintiff and plaintiff herself during

the course of the trial.

The occurrence upon which this suit is based took place November 18, 1934, at the Vic theatre, located at 3143 North Sheffield avenue, Chicago. The amended complaint consisted of eight counts. The fourth count was withdrawn by plaintiff upon motion of defendants. The jury was instructed at the close of all the evidence to return a verdict of not guilty as to the 5th, 6th, 7th and 8th counts, so that the case was submitted to the jury upon the first three counts, which in substance charged that defendants were in possession of the theater in question, its appurtenances, etc., were exhibiting motion pictures which they invited the public to see for a consideration; that plaintiff became a patron; that it became the duty of defendants to exercise reasonable and ordinary care in maintaining the entrances, exits, doors, floors, aisles, steps and seats, and other appurtenances and furnishings in such a manner and in such a state of construction and with sufficient light to enable the patrons to use the same while exercising ordinary care for their own safety; that defendants, disregarding their duty in that respect, failed to have the floor under and about the seats and adjacent to the aisles in the rear of the theater in a proper state of construction, but negligently and carelessly allowed the same to remain in such a condition that there was a step, drop, elevation or incline in the floor as one emerged from the seats in the rear of the theater into the aisle; that plaintiff fell, slipped or slid from this step across the aisle adjacent thereto and into a glass door, injuring her; that under the same circumstances, neglecting their duty, defendants failed to provide or place an usher or ushers near the place where plaintiff was sitting so as to warn, advise and caution her of the existence of the dangerous step or drop, and likewise negligently failed under the same circumstances to provide

the occurrence upon which this suit is based took place November 12, 1934, at the Vito Theatre, located at 2143 North Sheffield Avenue, Chicago. The amended complaint consisted of eight counts. The fourth count was withdrawn by plaintiff upon motion of defendant. The jury was instructed at the close of all the evidence to return a verdict of not guilty as to the 2nd, 3rd, 4th, 5th and 6th counts, so that the case was submitted to the jury upon the first three counts, which in substance charged that defendant was in possession of the theater in question, its appointments, etc., were exhibiting motion pictures which they invited the public to see for a consideration; that plaintiff being a patron; that it became the duty of defendant to exercise reasonable and ordinary care in maintaining the entrances, exits, doors, floors, aisles, steps and seats, and other appointments and furnishings in such a manner and in such a state of construction and with sufficient light to enable the patrons to use the same while exercising ordinary care for their own safety; that defendant, disregarding their duty in that respect, failed to have the floor under and about the seats and adjacent to the aisles in the rear of the theater in a proper state of construction, but negligently and carelessly allowed the same to remain in such a condition that there was a step, bump, elevation or decline in the floor as one emerged from the seats in the rear of the theater into the aisle; that plaintiff fell, slipped or slid from this step across the aisle adjacent thereto and into a glass door, in- juring her; that under the same circumstances, neglected to put defendant failed to provide or place an alarm or danger sign the place where plaintiff was sitting so as to warn, advise and caution her of the existence of the dangerous step or bump, and likewise negligently failed under the same circumstances to provide

reasonably safe and adequate lighting facilities and sufficient lights whereby plaintiff was injured without fault on her part.

The evidence tended to show that plaintiff, who was about 24 years of age, accompanied by Edward LeMonds, went from her home where she lived with her father and mother, 1309 Wellington avenue, about five blocks from defendants' theater, on the evening in question; that they arrived at the theater about 7 p. m.; that LeMonds purchased the tickets, plaintiff walked into the outer lobby; that the theater faced west; they walked into the theater together, dropped their tickets in the box and passed by the box where a boy was standing, passed through the lobby, entered into the foyer, which was about 20 feet long and 10 feet wide and uncarpeted; that as plaintiff entered she walked to the south, which was on her right hand, and walked toward the two glass swinging doors at the south end of the foyer; the moulding on these doors was about $1\frac{1}{2}$ feet around and the glass about 5 feet high and $2\frac{1}{2}$ feet wide. Plaintiff and her escort walked down the aisle. They testify that the condition of the theater as to light was that it was very dark, and as plaintiff walked up the aisle she could not see anything, as "when you first go into any moving picture theater." Plaintiff walked down the aisle about 3 or 4 feet and then turned around; she did not, she says, see any usher or attendant; she took a seat by her escort in the last row of seats; the first and second seats next the aisle were occupied; she took the third and her escort the fourth seat; they remained in these seats until the showing of the picture was over, perhaps a minute or two longer, until the picture came around to the place which was being shown at the time they entered the theater. Both foyer and theater were dark. Plaintiff did not notice any lights in the theater overhead or on the walls; she saw ushers while the picture was being shown; they carried flashlights; she did not remember stepping up on a step when

reasonably safe and adequate lighting facilities and sufficient lights whereby plaintiff was injured without fault on her part. The evidence tended to show that plaintiff, who was about 24 years of age, accompanied by Edward Leonda, went from her home where she lived with her father and mother, 1309 Wellington Avenue, about five blocks from defendant's theater, on the evening in question; that they arrived at the theater about 7 p. m.; that Leonda purchased the tickets, plaintiff walked into the outer lobby; that the theater faced west; they walked into the theater together, dropped their tickets in the box and passed by the box where a boy was standing, passed through the lobby, entered into the foyer, which was about 30 feet long and 10 feet wide and unobstructed; that as plaintiff entered she walked to the south, which was on her right hand, and walked toward the two glass swinging doors at the south end of the foyer; the moulding on these doors was about 14 feet around and the glass about 5 feet high and 2 1/2 feet wide. Plaintiff and her escort walked down the aisle. They testify that the condition of the theater as to light was that it was very dark, and as plaintiff walked up the aisle she could not see anything, as "when you first go into any moving picture theater." Plaintiff walked down the aisle about 3 or 4 feet and then turned around; she did not, she says, see any name or attendant; she took a seat by her escort in the last row of seats; the first and second seats next the aisle were occupied; she took the third and her escort the fourth seat; they remained in these seats until the showing of the picture was over, perhaps a minute or two longer, until the picture came around to the place which was being shown at the time they entered the theater. Both foyer and theater were dark. Plaintiff did not notice any lights in the theater overhead or on the walls; she saw names while the picture was being shown; they carried flashlights; she did not remember stepping up on a step when

she went into her seat. She did not see a step when she was going into her seat; she did not know how high the step was; she walked in first and her escort followed her; she stepped on the step but did not see it; during the performance she saw somebody in the rear but it was so dark she could not make out who it was; she saw a flashlight in the back; then she noticed an usher would flash around the flashlight; she says her eyesight was very good; she never wore glasses; when she got up to go out of this rear row of seats she was facing the front aisle toward the exit of the row facing the door, looking right in front of her; she took a step such as she always used if she was in a place like that; had on a pair of shoes with Cuban heels about 2 inches high; she walked naturally, moving slowly, was looking where she was walking; it was about a quarter of ten; she walked forward and got past a lady sitting there; the end seat was empty; her fur coat was over her left arm; it was not a long coat and she had outgrown it; it did not get under her feet because she had it up even with her breast holding it straight; she estimated the distance between the seat next to the aisle and the door as about 5 feet; she did not see any reflectors on the seats bordering the aisle nor any usher present when she left, but she saw the ushers in the lobby.

At the time she got up to go the lights in the theater were very dim. She stepped off the elevated portion of the floor and was thrown forward to the door; she did not trip or stumble; her head struck the moulding and her right arm went through the heavy plate glass of the door; she fell from the step, which was between 5 and 6 inches high, and was severely and permanently injured.

Lemonds testified he did not notice plaintiff when she stepped out; he was right behind her but could not see her feet nor see whether she stumbled or not. As he stood up out of his seat he looked toward the aisle and he saw her fall off the step across

she went into her seat. She did not see a step when she was going into her seat; she did not know how high the step was; she walked in first and her escort followed her; she stepped on the step but did not see it; during the performance she saw somebody in the rear but it was so dark she could not make out who it was; she saw a flashlight in the back; then she noticed an answer would it be around the flashlight; she says her eyesight was very good; she never wore glasses; when she got up to go out of this room now of seats she was facing the front aisle toward the exit of the row facing the door, looking right in front of her; she took a step such as she always used if she was in a place like that; had on a pair of shoes with a Cuban heel about 3 inches high; she walked naturally, moving slowly, was looking where she was walking; it was about a quarter of ten; she walked forward and got past a lady sitting there; the end seat was empty; her far coat was over her left arm; it was not a long coat and she had outgrown it; it did not get under her feet because she had it up even with her breast nothing it straight; she estimated the distance between the seat next to the aisle and the door as about 3 feet; she did not see any reflection on the seats bordering the aisle nor any other person when she left, but she saw the camera in the lobby.

At the time she got up to go the lights in the theater were very dim. She stepped off the elevated portion of the floor and was thrown forward to the door; she did not trip or stumble; her head struck the molding and her right arm went through the heavy plate glass of the door; she fell from the step, which was between 5 and 6 inches high, and was severely and permanently injured.

Leonsa testified he did not notice distinctly when she stepped out; he was right behind her but could not see her feet nor see whether she stumbled or not. As he stood up out of his seat he looked toward the aisle and he saw her fall off the step before

the aisle and through the door. The witnesses estimated the height of the step leading to this row of seats from 3 to 6 inches.

Plaintiff, describing her fall, said that she felt herself fly in the air.

The law applicable to owners in possession of premises used for theatrical performances to which the public is invited is well stated in Gibbons v. Balaban and Katz Corp., 242 Ill. App. 524.

The opinion quoted with approval from 38 Cyc. 268-269, as follows:

"The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance * * * *. He is required to use care and diligence to put and keep the premises and appliances in a reasonably safe condition for persons attending; and if he fails to perform his duty in this respect so that the premises or appliances are in fact unsafe, he may be held liable for personal injuries occasioned thereby * * * *. Reasonable care is held to be the measure of duty, and the undertaking of the proprietor is held not to call for an application of the same strict rule of responsibility as in the case of common carriers. He is not an insurer.' These rules have been held applicable as to the lighting of aisles, stairways, etc., of theaters (see note in 22 A.L.R. p. 670 et seq.) and to proprietors of moving picture theaters. (Andre v. Mertens, 88 N.J.L. 626, 628; Oakley v. Richards, 275 Mo. 266, 276; Bennetts v. Silver Bow Amusement Co., 65 Mont. 340, 356; Branch v. Klatt, 165 Mich. 666, 671.)"

Applying this rule to the facts of this case, we do not entertain a doubt that the court did not err in refusing at the close of the evidence to grant the motion of defendants for an instructed verdict in their behalf. Considering (as we must in passing on such a motion) the evidence in the light most favorable to plaintiff with all inferences to be drawn therefrom, we think the jury could reasonably find that defendants were negligent with respect to one or more of the matters charged in the first three counts submitted to the jury; that plaintiff was in the exercise of due care for her own safety, and that the negligence of defendants was the direct and proximate cause of the injuries which plaintiff received at that time. Also, while recognizing that there is a conflict in the evidence, we find it impossible to hold that the verdict is as to any one of these

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The law applicable to owners in possession of premises used for theatrical performances to which the public is invited is well stated in Gibbons v. Halaban and Sons Corp., 242 Ill. App. 524.

The opinion quoted with approval from 38 Cyc. 288-289, as follows:

"The owner of a place of entertainment is charged with an affirmative positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance * * *. It is required to use care and diligence to put and keep the premises and appliances in a reasonably safe condition for persons attending; and it he fails to perform this duty in this respect so that the premises or appliances are in fact unsafe, he may be held liable for personal injuries occasioned thereby * * *. Reasonable care is held to be the measure of duty, and the undertaking of the proprietor is held not to call for an application of the same strict rule of responsibility as in the case of common carriers. He is not an insurer. These rules have been held applicable as to the lighting of aisles, stairways, etc., of theaters (see note in 22 A.L.R. p. 670 et seq.), and to proprietors of moving picture theaters. (Andre v. Bennett, 88 A.L.R. 626; Quiley v. Richards, 275 Mo. 286, 276; Bennett v. Silver Bow Amusement Co., 65 Mont. 345, 356; Brannon v. White, 189 Wisn. 666, 671.)"

Applying this rule to the facts of this case, we do not entertain a doubt that the court did not err in refusing at the close of the evidence to grant the motion of defendants for an instructed verdict in their behalf. Considering (as we must in passing on such a motion) the evidence in the light most favorable to plaintiff with all inferences to be drawn in return, we think the jury could reasonably find that defendants were negligent with respect to one or more of the matters charged in the first three counts submitted to the jury; that plaintiff was in the exercise of due care for her own safety, and that the negligence of defendants was the direct and proximate cause of the injuries which plaintiff received at that time. Also, while recognizing that there is a conflict in the evidence, we find it impossible to hold that the verdict is as to any one of these

ultimate facts submitted to the jury clearly and manifestly against the weight of the evidence. The court did not err in denying the motion of defendants for a new trial for that reason.

It remains to determine whether there were procedural errors so serious as to deprive defendants of a fair trial.

Defendants complain that the argument of plaintiff's attorney to the jury was subject to criticism in that attention was called to the corporate character of defendants, and that defendants' supposed wealth was contrasted with plaintiff's poverty; that attorney for plaintiff recited evidence that was not legally and properly before the jury, particularly in that in his closing he spoke of plaintiff's "loss of blood for ten minutes, dribbling slowly," and spoke of plaintiff "losing half her blood." Also in that he misquoted the law to the jury, saying that if one of defendants' witnesses had been impeached in any one particular matter, the jury had a right to disregard all the testimony except where it is corroborated by other credible evidence; that defendants owed plaintiff the duty to see to it that the premises were safe and to see that proper appliances were used for plaintiff's safety. Also, in referring to damages in his closing argument, although defendants' attorney had not discussed that subject in his address to the jury and had stated that he was not contending concerning the question of damages; that the attorney endeavored to prejudice the defendants' case by making personal comments on the evidence and stating his personal opinion with regard to the facts.

It is also objected that the trial was unfair in that the attorney for plaintiff persisted in asking improper questions after he was admonished by the court and warned against doing so; that he consciously, repeatedly and intentionally violated the instructions of the trial court by referring to irrelevant, improper and prejudicial

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matters; that plaintiff's witnesses, Leggett, Fischer and LeMonds, did likewise in their testimony.

We have read the entire abstract of the testimony and of the proceedings and have given careful attention to the complaints made concerning these matters. It appears that defendants made three objections during the opening argument of the attorney for plaintiff and stated objections to parts of his closing argument. Defendants' attorney, however, did not insist upon or obtain a ruling by the trial court as to any one of these. In Appel v. Chicago Ry., 259 Ill. 561, the opinion states the general rule to be that a ruling of the trial court must be made or refused in order to preserve the question raised by the objection for review in the Appellate court. While the argument of attorney for plaintiff was in some respects subject to criticism, we do not find anything in it which would constitute reversible error. The jury seems to have been more than ordinarily intelligent and to have taken a personal interest in the trial. The jury was instructed and must have understood that it was to receive the law from the court rather than from plaintiff's counsel. It is not unusual for attorneys for each of the parties to insist that the other has misapprehended the law.

There is something of merit to the criticism of the conduct of witnesses for plaintiff and of plaintiff herself. During the trial she was repeatedly warned and admonished by the trial Judge who, the record shows, was alert at all times in this respect. On one occasion plaintiff indulged in tears moved to this apparently by the eloquence of her attorney. Women who are parties to a litigation in a court of justice should refrain from indulging in their usual privilege in this respect. However, it appears defendants were of the opinion that the conduct for which they criticize plaintiff had not been seriously prejudicial. This

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There is something of merit to the criticism of the conduct of witnesses for plaintiff and of plaintiff herself. During the trial she was repeatedly warned and admonished by the judge and the record shows, as aforesaid, that at all times in this respect. On one occasion plaintiff indulged in remarks moved to this apparently by the eloquence of her attorney. Women who are parties to a litigation in a court of justice should refrain from indulging in their usual privilege in this respect. To say, it appears defendant were of the opinion that the conduct for which they criticize plaintiff had not been seriously prejudicial.

is apparent from the fact that when, near the close of the case, plaintiff made a motion that a juror be withdrawn defendants objected vigorously. Apparently defendants were of the opinion that their interests had not been prejudiced by the matters of which they now complain.

Defendants also contend the judgment should be reversed because of prejudicial remarks of the trial Judge. There is no merit in this contention, nor did the defendants preserve for review the matters of this kind concerning which they now complain.

It is urged that the court erred in refusing to admit in evidence certain ordinances of the City of Chicago fixing a standard for lighting for motion picture houses, in excluding evidence of an expert, Mr. Bracher, as to whether a person with normal eyesight could see the riser at a distance of 10 feet, in refusing to offer by defendants to show that the theater was better lighted than the average moving picture house in Chicago.

The ordinances were not applicable to a situation such as was disclosed by the evidence, and if admitted would have tended to confuse. Count 6 of the plaintiff's complaint, which declared upon the ordinances of the City, was withdrawn on defendants' own motion. Defendants are hardly in a position to complain under these circumstances that these ordinances were not admitted in evidence. There was no foundation laid for the evidence of the expert Bracher. He did not see the premises until more than 13 months after the accident. Moreover, the question asked him was objectionable as calling for his opinion on the very issue of fact which was for the jury to decide. The offer of proof as to the condition of lights in other theaters as compared with defendants theater was clearly objectionable. The question was whether the theater was reasonably lighted and not what some other proprietor was accustomed to do with reference to the light.

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Defendants also contend the judgment should be reversed because of prejudicial remarks of the trial judge. There is no merit in this contention, nor did the defendants preserve for review the matters of this kind concerning which they now complain. It is urged that the court tried in retaining to admit in evidence certain ordinances of the City of Chicago fixing a standard for lighting for motion picture houses, in excluding evidence of an expert, Mr. Bracher, as to whether a person with normal eyesight could see the riser at a distance of 10 feet, in retaining an offer by defendants to show that the theater was better lighted than the average moving picture house in Chicago.

The ordinances were not applicable to a situation such as was disclosed by the evidence, and if admitted would have tended to confuse. Count 6 of the plaintiff's complaint, which depended upon the ordinances of the City, was withdrawn on defendants' own motion. Defendants were hardly in a position to complain under these circumstances that these ordinances were not admitted in evidence. There was no foundation laid for the evidence of the expert Bracher. He did not see the premises until more than 18 months after the accident. Moreover, the question asked him was objectionable as calling for his opinion on the very issue of fact which was for the jury to decide. The offer of proof as to the condition of lights in other theaters as compared with defendant's theater was clearly objectionable. The question was whether the theater was reasonably lighted and not what some other proprietor was considered to do with reference to the light.

Plaintiff lost much blood in the accident. Two doctors testified as to operations performed by them on the injured hand of plaintiff. Defendants object that this permitted a repetition of facts tending to arouse the sympathies of the jury. These matters were material. The objection is without merit.

It is contended that the court erred in giving instructions requested by plaintiff and in refusing instructions requested by defendants. The court gave 20 instructions - four at the request of plaintiff and 15 at the request of defendants. Defendants complain particular of instruction No. 4, by which the jury was in substance told that the plaintiff must establish her case by a preponderance of the evidence; that this preponderance was not alone necessarily determined by the number of witnesses testifying to a particular fact or state of facts, but that the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the case; the relation or connection, if any, between the witnesses and the parties; the apparent consistency, fairness, and congruity of the evidence; the probability or improbability of the truth of their several statements in view of all the other evidence, facts and circumstances proved on the trial, and from all of these facts, "taking into consideration the number of witnesses testifying to a particular fact or facts, determine upon which side is the weight or preponderance of the evidence."

It is contended in the first place that the instruction was objectionable because of the use of the word "should" in directing the jury. Defendants say the instruction should have read that the jury "might" or "may" consider certain factors, etc., and they cite

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It is contended in the first place that the instruction was objectionable because of the use of the word "should" in directing the jury. Defendants say the instruction should have read that the jury "might" or "may" consider certain facts, etc., and they cite

the case of Rudin v. Wheelock, 249 Ill. App. 249. The principal criticism of the instruction in that case was that it eliminated from consideration of the jury the element of the number of witnesses testifying to a given fact in determining the question of the preponderance of the evidence. The court also, it is true, criticized the use of the word "should," but that criticism seems to have been repudiated in the later case of Walters v. Checker Taxi Co., 265 Ill. App. 329, where the court said that "should" was the proper word to use. See also Posch v. Chicago Rys. Co., 221 Ill. App. 241. Lyons v. Chicago City Railroad Company, 258 Ill. 75; Chicago Union Traction Co. v. Hampe, 228 Ill. 346, also cited by defendants, are cases where the essential element of the number of witnesses testifying to a given fact or state of facts had been omitted. We hold there was no reversible error in the giving of this instruction.

Objection is also made that the trial court refused defendants' request to give an instruction which in substance told the jury that it was not required to believe a thing to be a fact simply because some witness had sworn it to be a fact if the jury believed from the evidence and conduct of such witness, as such witness appeared to the jury, or from the contradictory or improbable character of the story of such witness, if it appeared to the jury to be contradictory or improbable, that upon a full and intelligent weighing of the testimony it was unworthy of belief. An instruction substantially similar has been approved in a number of cases. Nowat v. Sandel, 262 Ill. App. 395; Goss Printing Press Co. v. Lemke, 191 Ill. 199; Devaney v. Otis Elevator Co., 251 Ill. 28. The instruction, however, was a cautionary one. Other instructions covered well the law concerning the weight to be given to the evidence, ^{and} while the instruction might well have been

the case of Harris v. Wheeler, 249 Ill. App. 349. The principal criticism of the instruction in that case was that it elicited from consideration of the jury the effect of the number of witnesses testifying to a given fact in determining the question of the preponderance of the evidence. The court also, it is true, criticized the use of the word "should," but that criticism seems to have been repeated in the later case of Winters v. Wheeler, 251 Ill. App. 329, where the court said that "should" was the proper word to use. See also Hosch v. Chicago Ry. Co., 281 Ill. App. 241. Lynch v. Chicago City Railroad Company, 283 Ill. 75; Chicago Union Traction Co. v. Hannes, 288 Ill. 240, also cited by defendant, are cases where the essential element of the number of witnesses testifying to a given fact or state of facts had been omitted. We hold there was no reversible error in the giving of this instruction.

Objection is also made that the trial court refused defendant's request to give an instruction which in substance told the jury that it was not required to believe a fact to be a fact simply because some witness had sworn it to be a fact in the jury believed from the evidence and conduct of such witness, as such witness appeared to the jury, or from the contradictory or improbable character of the story of such witness, if it appeared to the jury to be contradictory or improbable, that upon a full and intelligent weighing of the testimony it was unworthy of belief. An instruction substantially similar has been approved in a number of cases. Lowat v. Bandel, 282 Ill. App. 333; Doss Printing Press Co. v. Leake, 281 Ill. 193; Devaney v. City Elevator Co., 281 Ill. 92. The instruction, however, was a cautionary one. Other instructions covered well the law concerning the weight to be given to the evidence, while the instruction which well have been

given it was not, under all the circumstances here appearing, error to refuse it.

Complaint is also made that the court erred in refusing to give to the jury defendants' requested instruction No. 28, by which the jury would have been told that in passing upon the question of the liability or the non-liability of defendants, if, upon any disputed fact or state of facts, the evidence in the case, considered in the light of the court's instructions, was evenly balanced, or in such a state of uncertainty that the jury was in doubt thereon, and unable to say which way the evidence preponderated, the jury would have no right to give the benefit of the doubt to the plaintiff, but in such case the finding on such facts or state of facts, should be for the defendants. In support of their contention that this instruction should have been given defendants cite Johnston v. Gustafson, 233 Ill. App. 216. Defendants also cite on this point Chicago Union Traction Co. v. Mee, 218 Ill. 9; Koshinski v. Ill. Steel Co., 231 Ill. 198; McMahon v. Scott, 132 Ill. App. 582; Chicago Transit Co. v. Campbell, 110 Ill. App. 366, and City of Streator v. Liebendorf, 71 Ill. App. 625. The court, by defendants' given instruction No. 19, fully covered this point, and it was not error to refuse to instruct the jury twice on this subject. It is also contended that the court erred in refusing to give defendants' instructions Nos. 29 and 30, in which the issues as disclosed by the pleadings were defined, and the jury instructed further as to the law applicable. The defendants tendered to the trial Judge 24 instructions of which the Judge gave 16. Three of the instructions given told the jury at length what the plaintiff must prove in order to recover. We think it was not error to refuse these instructions for the reason that the jury had been adequately informed by other instructions concerning the law as stated in these.

Given it was not, under all the circumstances here appearing,

error to refuse it.

Complaint is also made that the court erred in refusing

to give to the jury defendants' requested instruction no. 30, by

which the jury would have been told that in passing upon the

question of the liability of the non-liability of defendants, it,

upon any disputed fact or state of facts, the evidence in the

case, considered in the light of the court's instructions, was

evenly balanced, or in such a state of uncertainty that the jury

was in doubt thereon, and unable to say which way the evidence

preponderated, the jury would have no right to give the benefit

of the doubt to the plaintiff, but in such case the finding on

such factor state of facts, should be for the defendants. In

support of their contention that this instruction should have been

given defendants cite Johnson v. Gustafson, 228 Ill. App. 216. De-

fendants also cite on this point Chicago Union Traction Co. v. Lee,

218 Ill. 2; Koshinski v. Ill. Steel Co., 231 Ill. 138; Johnson v.

Scott, 132 Ill. App. 582; Chicago Transit Co. v. Campbell, 112 Ill.

App. 366, and City of Chicago v. Lieberman, 71 Ill. App. 623.

The court, by defendants' given instruction no. 19, fully covered

this point, and it was not error to refuse to instruct the jury

twice on this subject. It is also contended that the court

erred in refusing to give defendants' instructions nos. 29 and

30, in which the issues as disclosed by the pleadings were defined,

and the jury instructed further as to the law applicable. The

defendants tendered to the trial judge 24 instructions of which

the judge gave 16. Three of the instructions given told the jury

at length that the plaintiff must prove in order to recover.

Think it was not error to refuse these instructions for the reason

that the jury had been adequately informed by other instructions

concerning the law as stated in these.

It is also urged that the verdict of the jury was so excessive as to indicate bias, passion and prejudice; that a new trial should have been granted for that reason, and that for the same reason this court should reverse the judgment and grant a new trial. In view of all the evidence submitted, we think the verdict of the jury is not subject to this criticism. The evidence shows that the plaintiff was a youngwoman supporting herself by her labors, in perfect health prior to the accident and steadily employed at \$22 a week. The medical expenses alone incurred by reason of the accident amounted to nearly \$2000. Her loss of wages from the date of the accident on November 18, 1934, to the date of the trial in December, 1935, amounted to approximately \$1200. Almost immediately following the accident she was taken by defendants' employees to a hospital where she underwent an emergency operation necessary to save her life; she was given transfusions of blood before a secondary operation could be performed; her hand is still shrunk and deformed as a result of the accident. Four transfusions of blood have been given since she left the hospital; her right hand is almost useless, and the evidence tends to show she cannot dress herself and requires constant care from others.

The evidence shows that plaintiff is permanently disabled. The cause was tried by a judge of large experience, who required a substantial remittitur. We entertain no doubt another jury would return a verdict of guilty and very probably assess damages at a much larger amount than that for which judgment was entered. We think substantial justice has been attained in this case, and that this litigation should be ended by the affirmance of this judgment. Defendants argue that it was error for the court to submit counts one and two to the jury. However, if there was evidence sufficient to support one good count, this was sufficient.

The judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

It is also noted that the verdict of the jury was an ex-
 cessive as to indicate bias, passion and prejudice; that a new
 trial should have been granted for that reason, and that for the
 same reason this court should reverse the judgment and grant a
 new trial. In view of all the evidence submitted, we think the
 verdict of the jury is not subject to this criticism. The evi-
 dence shows that the plaintiff was a young woman employed
 by her father, in perfect health prior to the accident and recently
 employed at \$25 a week. The medical expenses were incurred by
 reason of the accident amounted to nearly \$1000. Her loss of
 wages from the date of the accident on November 15, 1934, to the
 date of the trial in December, 1935, amounted to approximately
 \$1200. Almost immediately following the accident she was taken
 by defendant's employees to a hospital where she underwent an
 emergency operation necessary to save her life; she was given
 transfusions of blood before a secondary operation could be per-
 formed; her hand is still maimed and deformed as a result of the
 accident. Four transfusions of blood have been given since she
 left the hospital; her right hand is almost useless, and the evi-
 dence tends to show she cannot dress herself and requires constant
 care from others.

The evidence shows that plaintiff is permanently disabled.
 The case was tried by a judge of law, the jury was returned
 without objection. We entertain no doubt another jury would
 return a verdict of guilty and very probably assess damages at a
 much larger amount than that for which judgment was entered. We
 think substantial justice has been achieved in this case, and that
 this litigation should be ended by the affirmance of this judgment.
 Defendant argues that it was error for the court to admit certain
 one and two to the jury. However, if there was evidence sufficient
 to support the verdict, this was sufficient.

The judgment is affirmed.

RECORDED.

39364

ELSIE B. SPIEGEL,
Appellee,

vs.

TOBY PROVUS and ISADORE PROVUS,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COCK COUNTY.

291 I.A. 603²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

July 23, 1935, complainant filed her bill to foreclose a trust deed executed April 6, 1926, to secure an indebtedness of \$12,000 represented by principal notes and coupons. Defendants answered denying the right of complainant to foreclose, setting up an alleged oral agreement whereby default was waived, and denying they owed the amount claimed. The cause was referred to a master who took the evidence and filed his report, finding that the equities were with complainant, that the amount claimed by complainant was due, that defendants had made default, and recommending a decree of foreclosure. Objections of defendants were overruled by the master and by order stood as exceptions on the hearing before the chancellor. The exceptions were overruled and on October 29, 1936, a decree of foreclosure was entered to reverse which the defendants appeal.

The evidence showed that the notes executed in April, 1926, were three in number; two for \$1,000 each and one for \$10,000, all due in five years from date, drawing interest at 6% per annum. By the terms of the trust deed defendants agreed to pay on the first day of May in each year all taxes and assessments which had been levied, and that in case of default in this regard all the indebtedness secured by the trust deed with interest would, at the election of the holder of the notes, or any one of them, become at once due and payable. Notes Nos. 1 and 2 for \$1000 each were paid and have been cancelled.

April 1, 1931, the note for \$10,000 became due and payable.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY,

TORY PROVIS and ISAAC PROVIS,
Appellants.

ELMER E. SPRIGGS,

Appellee.

vs.

2911 A. 603

MR. PRESIDING JUDGE LAURETT
DELIVERED HIS OPINION OF THE COURT.

July 23, 1935, complainant filed her bill to foreclose a trust deed executed April 6, 1935, to secure an indebtedness of \$1,000 represented by principal notes and coupons. Defendants answered denying the right of complainant to foreclose, setting up an alleged oral agreement whereby default was waived, and denying they owed the amount claimed. The cause was referred to a master who took the evidence and filed his report, finding that the parties were with complainant, that the amount claimed by complainant was due, that defendants had made default, and recommending a decree of foreclosure. Objections of defendants were overruled by the master and by order about a week later on the hearing before the chancellor. The objections were overruled and on October 29, 1936, a decree of foreclosure was entered to reverse which the defendants appeal.

The evidence showed that the notes executed in April, 1935, were three in number; two for \$1,000 each and one for \$10,000, all due in five years from date, bearing interest at 6 per annum. By the terms of the trust deed defendants agreed to pay on the first day of May in each year \$11 taxes and assessments which had been levied, and that in case of default in this regard all the indebtedness secured by the trust deed with interest would, at the election of the holder of the notes, or any one of them, become at once due and payable. Notes Nos. 1 and 2 for \$1000 each were paid and have been cancelled.

April 1, 1931, the note for \$10,000 became due and payable.

By an agreement in writing of that date the time of payment of the amount due under the terms of said principal note was extended- \$1000 thereof until April 31, 1933, \$1000 until April 1, 1935, and \$8000 until April 1, 1936 - all with interest at 6%. April 1, 1933, defendants defaulted in payment of the note for \$1000 due on that date, and the owner of the indebtedness declared the whole amount due and payable.

May 20, 1933, complainant and defendants entered into a certain written extension agreement whereby it was agreed that \$2500 of the amount due should be paid on the principal of the indebtedness upon the signing of the agreement, and the further sum of \$5000 should be paid as follows: \$500 April 1, 1935, \$500 April 1, 1936, \$500 April 1, 1937, \$3500 April 1, 1938, with interest at 6% per annum from April 1, 1933, payable semi-annually on the balance remaining due from time to time. Said extension agreement further provided:

"In consideration of such extension and the sum of One Dollar to the undersigned in hand paid, the receipt and sufficiency of which is hereby acknowledged, the undersigned covenants and agrees:

1. That said note is evidence of a valid debt for the amount so extended;

2. To pay the same and interest thereon as hereby or hereafter extended;

3. That all of the terms, powers, covenants and provisions in said note and trust deed shall stand and remain unchanged and in full force and effect for said extended period and any subsequent extension thereof, except only as the same are hereby or by any subsequent extension agreement specifically varied or modified, and to keep and perform all of the terms, covenants and provisions of said note and trust deed, as hereby or hereafter modified, and of this agreement, and that in the event of default in the performance of any of the terms, covenants and provisions herein or in said note or in said trust deed contained, then in any such event the whole of said principal sum, together with accrued interest thereon, shall, at once or at any time thereafter, at the election of the holder of said note, without notice, become immediately due and payable, and may be collected in the same manner by foreclosure or at law or both or otherwise as if this extension had not been made;

* * * * *

In consideration of the payment of the said sum of \$2500 at the date hereof to apply on account of the principal indebtedness of \$10,000.00, and in further consideration of the agreement of the undersigned to pay the sum of \$5000.00 of said principal indebtedness

By an agreement in writing of that date the time of payment of the amount due under the terms of said principal note was extended \$1000 thereon until April 31, 1933, \$1000 until April 1, 1934, and \$8000 until April 1, 1935 - all with interest at 6% . . . April 1, 1933, defendants defaulted in payment of the note for \$1000 due on that date, and the owner of the indebtedness declared the whole amount due and payable.

May 30, 1933, complaint and defendants entered into a certain written extension agreement whereby it was agreed that \$2500 of the amount due should be paid on the principal of the indebtedness upon the signing of the agreement, and the further sum of \$3000 should be paid as follows: \$500 April 1, 1933, \$500 April 1, 1934, \$500 April 1, 1935, \$500 April 1, 1936, with interest at 6% per annum from April 1, 1933, payable semi-annually on the balance remaining due from time to time. Said extension agreement further provided:

"In consideration of such extension and the sum of one dollar to the undersigned in hand paid, the receipt and acknowledgment of which is hereby acknowledged, the undersigned covenants and agrees: 1. That said note is evidence of a valid debt for the amount so extended;

2. To pay the same and interest thereon as hereby or hereafter extended;

3. That all of the terms, powers, covenants and provisions in said note and trust deed shall stand and remain unchanged and in full force and effect for said extended period and any subsequent extension thereof, except only as the same are hereby or by any subsequent extension agreement specifically varied or modified, and to keep and perform all of the terms, covenants and provisions of said note and trust deed, as hereby or hereafter modified, and of this agreement, and that in the event of default in the performance of any of the terms, covenants and provisions herein or in said note or in said trust deed contained, then in any such event the whole of said principal sum, together with accrued interest thereon, shall, at once or at any time thereafter, at the election of the holder of said note, without notice, become immediately due and payable, and may be collected in the same manner by foreclosure or at law or both or otherwise as if this extension had not been made;

In consideration of the payment of the said sum of \$2500 at the date hereof to apply on account of the principal indebtedness of \$10,000.00, and in further consideration of the agreement of the undersigned to pay the sum of \$8000.00 of said principal indebtedness

and accrued interest thereon in the manner as hereinbefore provided during the period of this extension, and in further consideration of the payment of all taxes past due and accruing as hereinafter provided on the above described premises by the undersigned, it is understood and agreed that upon the payment by the undersigned of the said sum of \$2500.00 as herein provided, and upon the payment of the said principal sum of \$5000.00 and accrued interest thereon during the said extended period, the owner and holder of the said principal note of \$10,000.00 will cancel and deliver the same to the undersigned, their agents or assigns, and waive, cancel and release the undersigned, their heirs, legal representatives, successors and assigns from any and all further liability and obligation thereon, and therefor, for the balance of \$2500.00 of the said note.

It is further understood and agreed that in the event of default in the payment of either principal or interest as herein provided, and such default continues for a period of thirty days after written demand for payment has been made by registered mail, addressed to the undersigned at the last known place of residence in the City of Chicago and State of Illinois, then the entire principal sum remaining unpaid, together with the accrued interest thereon, shall immediately become due and payable upon demand at the option of the owner and holder of said principal note. It is understood, however, that no interest is to be charged on the said \$2500.00 to be cancelled, as aforesaid, except in the event of a default."

The extension agreement further provided there should be no default declared for non-payment of taxes for the years 1928, 1929 and 1930, and the first installment of 1931, so long as no sale or forfeiture was had of the property for non-payment of these taxes, nor in the event of any such sale or forfeiture, so long as redemption should be made therefrom within 60 days, and said provision should not apply to the second installment of the general taxes for the year 1931 or any other general taxes or special assessments accruing thereafter.

Defendants paid the \$2500 upon signing the agreement, and thereafter paid on or about October 1, 1933, April 1, 1934, October 1, 1934, and April 1, 1935, the installments of interest due and payable on the note as extended. March 25, 1935, defendants made a payment of \$350 on account of the principal note as extended, and June 9, 1935, paid the further sum of \$150 on account of the principal of said note. The decree finds and the proof tends to show that on July 23, 1935, defendants made default in payment of general real estate taxes levied and assessed against the real estate for the

and accrued interest thereon in the manner as hereinbefore provided during the period of this extension, and in further consideration of the payment of all taxes past due and accruing as hereinbefore provided on the above described premises by the undersigned, it is understood and agreed that upon the payment by the undersigned of the said sum of \$2,500.00 as herein provided, and upon the payment of the said principal sum of \$500.00 and accrued interest thereon during the said extended period, the order and notice of the said principal note of \$10,000.00 will cancel and deliver the same to the undersigned, their heirs or assigns, and wife, cancel and release the undersigned, their heirs, legal representatives, assigns, heirs and assigns from any and all further liability and obligation, and hereafter, for the balance of \$500.00 of the said note, thereon, and hereafter, and need that in the event of

default in the payment of either principal or interest as herein provided, and such default constitutes for a period of thirty days after written demand for payment has been made by registered mail, added to the undersigned at the last known place of residence in the City of Chicago and State of Illinois, then the entire principal sum remaining unpaid, together with the accrued interest thereon, shall immediately become due and payable from and to the option of the owner and holder of said principal note. It is understood, however, that no interest is to be charged on the said \$250.00 to be cancelled, as aforesaid, except in the event of a default."

The extension agreement further provided there should be no

default declared for non-payment of taxes for the years 1927, 1928 and 1929, and the first installment of 1931, so long as no sale or foreclosure was had of the property for non-payment of these taxes, nor in the event of any such sale or foreclosure, so long as redemption should be made therefrom within 60 days, and said provision should not apply to the second installment of the general taxes for the year 1931 or any other general taxes or special assessments accruing thereafter.

Defendants said the \$250.00 was paid in the payment, and thereafter paid on or about October 1, 1933, April 1, 1934, October 1, 1934, and April 1, 1935, the installment of interest due and payable on the note as extended. March 15, 1935, defendants made a payment of \$350 on account of the principal note as extended, and June 2, 1935, paid the further sum of \$150 on account of the principal of said note. The decree finds and the court tends to show that on July 23, 1935, defendants had default in payment of general real estate taxes levied and assessed against the real estate for the

last half of the year 1931 and for the years 1932 and 1933, but that shortly after the filing of the complaint on July 23, 1935, defendants paid or caused these to be paid with the exception of \$81.74 of the taxes for the year 1932, which was left unpaid through no fault of defendants, because of an error in rendering the tax bill. Defendants contend that as to the actual defaults in the payment of taxes the same were induced by statements made by plaintiff that she would not insist upon prompt payment of these taxes. The master found from the evidence that plaintiff did not make the statements said to have induced defendants to default in this regard; that the defaults existed on the 18th day of June, 1935, at the time of the filing of the bill of complaint. A decree of foreclosure was entered, stating the account between the parties without allowance to defendants for the \$2500 credit which they were to receive under the terms of the extension agreement. The decree finds the total sum due to be \$8526.01, and in default of payment directed the property to be sold.

Defendants contend that the court erred in finding they were in default in their failure to pay taxes according to the terms of the extension agreement, because plaintiff, by her conduct and agreements, waived her right to foreclose for non-payment of taxes. We have given consideration to the evidence on this point. The burden of proof to establish a waiver by plaintiff was on defendants, and defendants undertook to prove this by the evidence of defendant Isadore Provus, who testified in substance that March 24, 1935, he talked with plaintiff with reference to the payment of \$650 of the principal due April 1, 1935, and suggested that he would send her a check for \$350 and pay the balance in a couple of months, and in that way would be able to save money so that he could pay the taxes afterward, and that plaintiff replied in substance that her son was running her business for her, and that anything he would

last half of the year 1932 and for the years 1932 and 1933, but that shortly after the filing of the complaint on July 13, 1935, defendants paid or caused these to be paid with the exception of \$81.74 of the taxes for the year 1933, which was left unpaid through no fault of defendants, because of an error in returning the tax bill. Defendants contend that as to the actual deficits in the payment of taxes the same were induced by erroneous acts by plaintiff that are would not least upon prompt payment of these taxes. The master found from the evidence that plaintiff did not make the statements said to have induced defendants to default in this regard; that the deficits existed on the 15th day of June, 1935, at the time of the filing of the bill of complaint. A review of the record was entered, stating the account between the parties without allowance to defendants for the \$250 credit which they were to receive under the terms of the extension agreement. The decree finds the total sum due to be \$8336.01, and in default of payment directed the property to be sold.

Defendants contend that the court erred in finding they were in default in their failure to pay taxes according to the terms of the extension agreement, because plaintiff, by her conduct and agreements, waived her right to foreclose for non-payment of taxes. We have given consideration to the evidence on this point. The burden of proof to establish a waiver by plaintiff was on defendants, and defendants undertook to prove this by the evidence of defendant Isadore Provera, who testified in substance that on 24, 1935, he talked with plaintiff with reference to the payment of \$650 of the principal due April 1, 1935, and suggested that he would send her a check for \$350 and pay the balance in a couple of months, and in that way would be able to save money so that he could pay the taxes afterward, and that plaintiff replied in substance that her son was running her business for her, and that anything he would

agree to was perfectly right. Isadore Provus also testified that he talked with plaintiff's son on the same date, and that the son told him he should pay interest and principal first, and that he could pay the taxes a little later. These conversations were denied by plaintiff and also by her son, Gabriel Spiegel. The master who saw the witnesses found against defendants on this issue. The chancellor approved his finding, and this court is not able to say that the finding of the decree in this respect is clearly and manifestly against the weight of the evidence. Pasedach v. Auv, 364 Ill. 491.

Defendants contend in the next place that plaintiff had no right to accelerate the time of payment of the indebtedness because of default in payment of taxes. The trust deed provides that if default shall be made in payment of either principal, interest or taxes, at the election of the legal holder of the notes and without notice, the whole amount should become at once due and payable to the same extent as if the indebtedness had matured by express term. The extension agreement provides that all the terms, promises, covenants and provisions of the trust deed shall stand unchanged and in full force and effect for the extended period, except only in so far as the same were modified by the extension agreement or some subsequent agreement. The extension agreement provides that in the event of default in the payment of either principal or interest which shall continue for a period of 30 days after written demand, the entire principal sum remaining unpaid with accrued interest shall immediately become due and payable upon demand at the option of the owner or holder of the principal note.

The extension agreement then goes on further to provide that taxes for certain periods shall not be considered as defaults. We hold the fair inference is, construing the trust deed and extension agreement together, that a failure to pay taxes other than those expressly exempted by the extension agreement should constitute a

agreed to was perfectly right. Leasehold Provisions also testified that he talked with Plaintiff's son on the same date, and that the son told him he should pay interest and principal first, and that he could pay the taxes a little later. These conversations were denied by Plaintiff and also by her son, Gabriel Spiegel. The master who saw the witnesses found against defendants on this issue. The chancellor approved his finding, and this court is not free to say that the finding of the decree in this respect is clearly and manifestly against the weight of the evidence. Leasehold v. A.W. & M. Ill. 451. Defendants contend in the next place that Plaintiff had no right to accelerate the time of payment of the installment because of default in payment of taxes. The trust deed provides that if default shall be made in payment of either principal, interest or taxes, at the election of the legal holder of the notes and without notice, the whole amount should become at once due and payable to the same extent as if the installment had matured by express term. The extension agreement provides that all the terms, provisions, covenants and provisions of the trust deed shall stand unchanged and in full force and effect for the extended period, except only in so far as the same were modified by the extension agreement or some subsequent agreement. The extension agreement provides that in the event of default in the payment of either principal or interest which shall continue for a period of 30 days after written demand, the entire principal sum remaining unpaid with accrued interest shall immediately become due and payable upon demand at the option of the owner or holder of the principal note.

The extension agreement then goes on further to provide that taxes for certain periods shall not be considered as defaults. We hold the fair inference is, construing the trust deed and extension agreement together, that a failure to pay taxes other than those expressly excepted by the extension agreement would constitute a

default as provided in the terms of the trust deed. We hold, therefore, that the nonpayment of taxes was a default for which a foreclosure might be brought.

It does not follow, however, that nonpayment of taxes would obligate defendants to pay the indebtedness of \$2500 which, by the terms of the extension agreement, was deducted from the amount of the principal note. The extension agreement was drawn by plaintiff's attorney and is therefore to be construed most strongly against her. Toffenetti v. Mellor, 323 Ill. 144; McConnaughy v. Gage, 252 Ill. App. 17. By the terms of the extension agreement the note is to be evidence of a valid indebtedness "for the amount so extended." But as to this \$2500 there was no extension. By the terms of the extension agreement the time of payment of the note was changed, and the total amount to be paid thereon reduced. \$2500 was paid by defendants at the time of the execution of the extension agreement; \$5000 was to be paid at certain extended dates; \$2500 of the amount was not to be paid at all. At least there was no agreement to pay it, and the extension agreement provided that when other payments as extended had been made the note was to be surrendered. In effect the arrangement was for a cash payment, reduction of the total amount to be paid to \$7500 payable at extended dates as specified. Plaintiff says that this agreement to accept a less amount than the face of the note was void for want of consideration. When this defense was set up in the answer of defendants, plaintiff made a motion to strike the paragraph setting up the defense for that reason. The motion was denied. Nevertheless the master computed the amount due upon the theory that by reason of default in paying taxes, the original indebtedness for the full amount due at the time of making the extension agreement was collectible. We hold the master erred in so finding and the chancellor in approving the finding. The agreement

default as provided in the terms of the first note. We hold, therefore, that the nonpayment of taxes was a default for which a foreclosure might be brought.

It does not follow, however, that nonpayment of taxes would obligate defendants to pay the indebtedness of \$2300 which, by the terms of the extension agreement, was deducted from the account of the principal note. The extension agreement was drawn by plaintiff's attorney and is therefore to be construed most strongly against her. Totten v. Totten, 323 Ill. 141; Winn v. Winn, 323 Ill. App. 14. By the terms of the extension agreement the note is to be a valid indebtedness "for the amount so extended." But as to this \$2300 there was no extension. By the terms of the extension agreement and the time of payment of the note was changed, and the total amount to be paid thereon reduced. \$2300 was paid by defendant at the time of the execution of the extension agreement; \$2000 was to be paid at certain extended dates; \$250 of the amount was not to be paid at all. At least there was no agreement to pay it, and the extension agreement provided that when other payments as provided had been made the note was to be extinguished. In effect the extension agreement was a cash payment, reduction of the total amount to be paid to \$2000 payable at extended dates as specified. Plaintiff says that this agreement to accept a less amount than the face of the note was void for want of consideration. When this defense was set up in the answer of defendants, plaintiff made a motion to strike the paragraph setting up the defense for that reason. The motion was denied. Nevertheless the master computed the amount due upon the theory that by reason of default in paying taxes, the original indebtedness for the full amount due at the time of making the extension agreement was collectible. We said the master erred in so finding and the chancellor in approving the finding. The agreement

to reduce the amount of the debt was not void as being without consideration. It is true that by the strict rule of the common law an agreement between a creditor and debtor to the effect that the creditor would take a less amount than due was without consideration and void. But in Donahue v. Brooks, 143 Ill. App. 188, this court in substance said that while a payment of a lesser sum would not discharge a debt of greater sum without some additional compensation, "yet it is also well settled that where the creditor receives anything of benefit to himself, that he would not otherwise have had, together with a payment of a lesser sum, there may be an accord and satisfaction." In Winter v. Meier, 151 Ill. App. 572, we said:

"Yet a slight variation in the way of added consideration will readily remove a case from the operation of this strict common law doctrine. So the courts of this and other States have held that any other consideration not of intrinsic value to the creditor, moving from the creditor, is sufficient to withdraw the case from the operation of the common law doctrine."

In Day v. Gardner, 42 New Jersey Equity, 199, where a defendant in a foreclosure proceeding pleaded the extinguishment of the debt through an agreement to reduce the mortgage from \$900 to \$500, and the interest rate from 7% to 6%, if defendant paid past due taxes, which the defendant did, the court held this agreement to pay the taxes which constituted a lien prior to the mortgage, made plaintiff more secure and gave her a substantial benefit, and that the contract for the reduction of the debt rested upon a valuable consideration. In Anderson v. Bills, 335 Ill. 524, the Supreme court defined a valuable consideration as, "either of some right, interest, profit or benefit accruing to one party, or some forbearance detriment, loss or responsibility given, suffered or undertaken by the other."

Here the extension agreement recites a new consideration of \$1.00, receipt of which is acknowledged. The extension agreement is also under seal. By its terms the defendants bound themselves to

to reduce the amount of the debt was not void as being illegal consideration. It is true that by the strict rule of the common law an agreement between a creditor and debtor to the effect that the creditor would take a less amount than due was without consideration and void. But in Dunne v. Brooks, 143 Ill. App. 129, this court in substance said that while a payment of a lesser sum would not discharge a debt of greater sum without some additional consideration, "yet it is also well settled that where the creditor receives any thing of benefit to himself, that he would not otherwise have had, together with a payment of a lesser sum, there may be an accord and satisfaction." In Winter v. Reiser, 151 Ill. App. 411, we said:

"Yet a slight variation in the way of added consideration will readily remove a case from the operation of this strict rule of law. So the courts of this and other states have held that any other consideration not of intrinsic value to the creditor, coming from the debtor, is sufficient to vitiate the case from the operation of the common law doctrine."

In Day v. Gardner, 45 New Jersey Equity, 199, there is a defendant in a foreclosure proceeding pleaded the extinguishment of the debt through an agreement to reduce the mortgage from \$200 to \$50, and the interest rate from 7% to 6%, it defendant paid past due taxes, which the defendant did, the court held this agreement to pay the taxes which constituted a lien prior to the mortgage, made plaintiff more secure and gave her a substantial benefit, and that the contract for the reduction of the debt rested upon a valuable consideration. In Anderson v. Ellis, 135 Ill. 524, the supreme court defined a valuable consideration as, "either of some right, interest, profit or benefit accruing to one party, or some forbearance detriment, loss or responsibility given, suffered or undertaken by the other."

Here the extension agreement recites a new consideration of \$1.00, receipt of which is acknowledged. The extension agreement is also under seal. By its terms the defendants bound themselves to

plaintiff by new and independent promises and covenants with reference to times of payment, etc. Defendants also paid the plaintiff's attorney a fee of \$75 for his services in drawing up the extension agreement. We hold there was a valuable consideration for the reduction of the debt, and that plaintiff was bound thereby. The attempt of plaintiff to reinstate and collect this \$2500 (which it had been agreed by the parties should be wiped out) on the grounds of a default in the strict letter of the contract as to the payment of a small amount of taxes, seems oppressive in its nature and conduct which does not appeal to a court of equity. It is also contrary to the terms of the extension agreement which, as we have said, was based on a valuable consideration. Under the strict letter of the law, plaintiff was perhaps entitled to maintain her bill to foreclose, but she was not entitled to recover a judgment for the \$2500 principal which had been remitted. For the error in allowing this item the decree is reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

plaintiff by new and independent witnesses and documents with reference to times of payment, etc. Defendant also paid the plaintiff's attorney a fee of \$10 for his services in drawing up the extension agreement. We hold there was a valid extension agreement for the reduction of the debt, and that plaintiff was bound thereby.

The attempt of plaintiff to renege and collect this \$2500 (which it had been agreed by the parties should be wiped out) on the grounds of a default in the strict letter of the contract as to the payment of a small amount of taxes, seems oppressive in its nature and conduct which does not appear to be a case of equity.

It is also contrary to the terms of the extension agreement which as we have said, was based on a valid consideration. Under the strict letter of the law, plaintiff was perhaps entitled to maintain her bill to the extent, but she was not entitled to recover a judgment for the \$2500 principal which had been reduced for the error in allowing this item the interest is reversed and the case remanded for proceedings consistent with this opinion.

REVERED AND HONORABLE.

O'Connor and Kennedy, J., concur.

ESTHER COLEMAN,
Appellant,

vs.

GEORGE WIENBOEBER, INC., et al.,
Appellees.

3 }
A }
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

291 I.A. 603³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action at law to recover damages for alleged negligence whereby plaintiff was injured, and upon trial by jury, there was a verdict for defendant, upon which the court, overruling plaintiff's motion for a new trial, entered judgment, from which plaintiff appeals.

It is argued that the verdict and judgment are against the manifest weight of the evidence and that the court erred in the giving of instructions.

The accident in which plaintiff was injured occurred August 22, 1934, at the intersection of Leland and Malden avenues in Chicago. Leland avenue runs east and west; Malden extends north and south. The evidence shows that plaintiff at the time in question had arranged to meet a friend, Ruth Talmadge, at this place; that Ruth Talmadge had arrived and was waiting at the southeast corner of the intersection. Plaintiff with her daughter Janet was at the northeast corner of the intersection; there were no cars parked on the street; plaintiff could see the traffic coming from the east; it was a clear day and about one o'clock p. m. Plaintiff took three steps south into Leland avenue and saw defendant's car coming from the east going west and about 50 feet away; it was being driven at an average speed; she stood waiting for the car to pass; she saw the front end of the car pass by her and within a foot of her and then the handle of the door of the automobile caught her and she was severely injured.

ESTHER COLLIER, Appellant,

vs.

GEORGE WIMBORER, INC., et al., Appellees.

DELIVERED THE OPINION OF THE COURT.

IN AN ACTION AT LAW TO RECOVER DAMAGES FOR ALLEGED NEGLIGENCE WHEREBY PLAINTIFF WAS INJURED, AND UPON TRIAL BY JURY, THERE WAS A VERDICT FOR DEFENDANT, UPON WHICH THE COURT, OVER- RULING PLAINTIFF'S MOTION FOR A NEW TRIAL, ENTERED JUDGMENT, FROM WHICH PLAINTIFF APPEALS.

IT IS ORDERED THAT THE VERDICT AND JUDGMENT BE REVERSED.

THE HIGHEST WEIGHT OF THE EVIDENCE AND THAT THE COURT TRIED IN THE GIVING OF INSTRUCTIONS.

THE ACCIDENT IN WHICH PLAINTIFF WAS INJURED OCCURRED

AUGUST 22, 1934, AT THE INTERSECTION OF BELMONT AND ALDEN AVENUES

IN CHICAGO. BELMONT AVENUE RUNS EAST AND WEST; ALDEN AVENUE

NORTH AND SOUTH. THE EVIDENCE SHOWS THAT PLAINTIFF AT THE TIME

IN QUESTION WAS ARRANGED TO MEET A FRIEND, BUT THAT, AT THIS

PLACE; THAT AFTER TALKING AND WAITING AND WAS WAITING AT THE SOUTH- EAST CORNER OF THE INTERSECTION. PLAINTIFF WITH HER DAUGHTER JANET

WAS AT THE NORTHEAST CORNER OF THE INTERSECTION; THERE WERE NO CARS

PARKED ON THE STREET; PLAINTIFF COULD SEE THE TRAFFIC COMING FROM

THE EAST; IT WAS A CLEAR DAY AND ABOUT ONE O'CLOCK P. M. PLAINTIFF

TOOK THREE STEPS SOUTH INTO BELMONT AVENUE AND HER DAUGHTER'S CAR

COMING FROM THE EAST GOING WEST WAS ABOUT 50 FEET AWAY; IT WAS

BEING DRIVEN AT AN AVERAGE SPEED; THE CAR WAS WAITING FOR THE CAR TO

PASS; SHE SAW THE FRONT END OF THE CAR PASS BY HER AND WITHIN A

FOOT OF HER AND THEN THE HANDLE OF THE DOOR OF THE AUTOMOBILE CAUGHT

HER AND SHE WAS SEVERELY INJURED.

The controlling question of fact in the case is whether defendant swerved his car to the right after it was half past the plaintiff, so that she was caught by the right front door handle, or whether plaintiff, without defendant swerving his car from a straight line, fell or walked into the handle of the door of the automobile.

Plaintiff, her daughter Janet, Mrs. Talmadge and Mr. Foss, who at the time was driving his car in a westerly direction on the same street and about 100 feet behind defendants' car, gave testimony (all of it more or less uncertain) to the effect that when defendant's car was about half way past plaintiff, while she was standing in the street and awaiting the passing of defendant's automobile, swerved North and to the right, causing the handle of the car to strike plaintiff. On the other hand the defendant gave evidence tending to show that plaintiff walked or fell into the side of the car.

Plaintiff in this court has argued the question of fact upon the theory that defendant was negligent in that while driving west in Leland avenue the driver failed to give plaintiff the right of way as required by the Uniform Traffic Code for the City of Chicago, Article IV, sec. 15, and in conformity with this theory plaintiff has cited a number of authorities, among which are Berry's Law of Automobiles, 7th ed., sec. 3.191; Merrifield v. Hoffberger, 127 Atl. 500; McQuigay v. Childs et al., 3 Pac. (2d) 309; and Johnson v. Johnson, 147 Pac. 649. The uncontradicted evidence, however, is to the effect that at the time plaintiff was injured she was not in any way attempting to exercise a pedestrian's superior right of way. The evidence shows without contradiction that if she had such right it was waived, her own testimony being to the effect that she waited to let defendant's car pass by her. The question as to whether the driver of defendant's car was guilty

The controlling question of fact in this case is whether defendant swerved his car to the right after it was overtaken and plaintiff, so that the car was out of the right of travel, or whether plaintiff, without defendant swerving his car, drove or whether plaintiff, tell or failed into the hands of the door of the automobile.

Plaintiff, her daughter, Mrs. [redacted] and Mr. [redacted], who at the time was driving his car in a westerly direction on the same street and about 100 feet behind defendant's car, gave testimony (1) of it more or less uncertain) to the effect that when defendant's car was about half way past plaintiff, while she was standing in the street and watching the passing of defendant's automobile, swerved northward, and that, during the time of the car to strike plaintiff. On the other hand, defendant gave evidence tending to show that plaintiff swerved or fell into the side of the car.

Plaintiff in this court has argued the question of fact upon the theory that defendant was negligent in that while driving west in Ireland avenue the driver failed to give plaintiff the right of way as required by the Uniform Traffic Code for the City of Chicago, Article IV, sec. 16, and in conformity with this theory plaintiff has cited a number of authorities, among which are Perry's Law of Automobiles, 7th ed., sec. 3.191; Northrup v. Northrup, 137 Atl. 500; McQuinn v. Collins, 310 (1925); 309; and Johnson v. Johnson, 147 Pac. 649. The court decided evidence, however, is to the effect that at the time plaintiff was injured she was not in any way attempting to exercise a pedestrian's superior right of way. The evidence shows almost contradiction that it had been right it was believed, her own testimony being to the effect that she waited to let defendant's car pass by her. The question as to whether the driver of defendant's car was guilty

of negligence in swerving to the right presented a question of fact for the jury. In view of the uncertain and contradictory evidence given for plaintiff on this point this court may not properly hold that the verdict is against the manifest weight of the evidence. Such a finding is negatived by proof of physical facts concerning the construction of the car, which show that the handle of the door by which plaintiff was injured extended only 2½ inches from the body of the car, and that a plumb line fastened to the outside of the handle would show it to be several inches inside the running-board of defendant's automobile.

Plaintiff further contends that the court erred in instructing the jury at the request of defendant, that the plaintiff was just as much in duty bound to exercise ordinary care to look out for and to avoid colliding with the automobile at the time and place in question as the defendant was to look out for and avoid colliding with the plaintiff. Plaintiff's argument is to the effect that this instruction was erroneous because plaintiff had a superior right of way which defendants were bound to recognize, and upon recognition of which plaintiff had a right to rely. As we have already pointed out, there is no question of right of way in the case. If such a right existed it was waived by the plaintiff. When plaintiff determined to await the passing of defendants' automobile before proceeding across the street ahead of it, the ordinance giving her the right of way ceased to be applicable. The duty of exercising due care for her own safety under all the circumstances was upon her regardless of her superior right to the way. There was no error in the instruction. Tuttle v. Checker Taxi Co., 274 Ill. App. 525.

The only questions in this case concern issues of fact on which the verdict of the jury is controlling. The judgment is therefore affirmed.

AFFIRMED.

McSurely, J., concurs.

O'Connor, J., specially concurs. (See next page.)

of negligence in serving to the fact presented a question of fact for the jury. In view of the uncertainty and contradictory evidence given for plaintiff on this point this court may not properly hold that the verdict is against the plaintiff as to the evidence. Such a finding is negated by proof of physical facts concerning the construction of the car, which show that the handle of the door by which plaintiff was injured extended only 24 inches from the body of the car, and that a child line fastened to the outside of the handle would show it to be several inches inside the running-board of defendant's automobile.

Plaintiff further contends that the court erred in in-

structing the jury at the request of defendant, and the plaintiff was just as much in duty bound to exercise ordinary care to look out for and to avoid colliding with the automobile at the time and place in question as the defendant was to look out for and avoid colliding with the plaintiff. Plaintiff's argument is to the effect that this instruction was wrong as because plaintiff had a superior right of way which defendant was bound to recognize, and upon recognition of which plaintiff had a right to rely. As we have already pointed out, there is no question of right of way in the case. If such a right existed it was waived by the plaintiff. When plaintiff entered the crossing of defendant's automobile while proceeding across the street ahead of it, the ordinary giving her the right of way seemed to be applicable. The duty of exercising due care for her own safety under all the circumstances was upon her regardless of her superior right to the way. There was no error in the instruction. Little v. Becker, 101

Cal. 2d 111, 124, 328.
The only questions in this case concern issues of fact on which the jury is to decide. The instruction is therefore affirmed.
AFFIRMED.
COURT, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.
(See next page.)

I think the evidence shows that defendant Joseph Carlin, who was driving the Wienhosber automobile, as he was passing plaintiff turned the automobile to the right, probably to go north in Malden avenue on his way to Lake Forest. This caused the rear end of the automobile to pass closer to plaintiff than the front end of it, as a result of which plaintiff was struck by the handle of the door and severely injured. But the jury and the Judge, who saw and heard the witnesses testify, apparently did not take this view of the evidence. They were in a better position to determine the truth of the matter than I am, having but the printed page before me. And in view of this fact I am unable to say that the finding and judgment are against the manifest weight of the evidence.

I think the evidence shows that defendant Joseph Berlin, who was driving the Winchester automobile, as he was passing plaintiff entered the automobile to the left, probably to go north in Garden Avenue on his way to take a taxi. This occurred the rear end of the auto of the plaintiff to pass across to the front end of it, as a result of which plaintiff was struck by the handle of the door and severely injured. But one jury and the judge, who saw and heard the witnesses testify, apparently did not take this view of the evidence. They were in a better position to determine the truth of the matter than I am, having but the printed page before me. And in view of this I am unable to say that the finding and judgment are against the manifest weight of the evidence.

39433

C. L. WILLIAM KRAUSE,

Appellee,

vs.

DODGE BROTHERS CORPORATION, a Corporation, and FREDERICK M. PAULL,
Appellants.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

291 I.A. 604¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action for negligence, upon trial by jury, at the close of all the evidence the defendant made a motion for a directed verdict which was denied. The jury returned a verdict for plaintiff with damages assessed at \$2500. The court, overruling motions of defendant for judgment notwithstanding the verdict and for a new trial, entered judgment from which the defendant appeals, presenting in his brief only one point, namely, that plaintiff was guilty of contributory negligence as a matter of law.

The complaint was in two counts, one of which charged against defendant certain specific acts of negligence ^{by} which plaintiff was injured while in the exercise of due care. The other count was based on the theory that the negligence of defendant was willful and wanton. This count did not aver due care on the part of plaintiff. Both counts were submitted to the jury and there was some evidence from which the jury could reasonably have returned a verdict under either count. Defendant does not argue that there was no evidence tending to sustain the averments of the second count. The point, therefore, that plaintiff was guilty of contributory negligence would not, even if admitted, be controlling, nor the cases cited, such as Hooker v. Adams Express Co., 299 Ill. 169, and similar cases determinative.

The accident in which plaintiff was injured occurred about eight o'clock a. m. the morning of May 19, 1934, at the intersection

C. L. WILLIAM BRADY,
Appellee,

vs.

DODGE BROTHERS CORPORATION, a cor-
poration, and WILLIAM L. BRADY,
Appellants.

221 I.A. 604

MR. PRESIDENT JUSTICE ROBERTSON
DELIVERED THE OPINION OF THE COURT.

In an action for negligence, upon trial by jury, at the close of all the evidence the defendant made a motion for a directed verdict which was denied. The jury returned a verdict for plaintiff with damages assessed at \$2500. The court, overruling motions of defendant for judgment notwithstanding the verdict and for a new trial, entered judgment from which the defendant appeals, presenting in his brief only one point, namely, that plaintiff was guilty of contributory negligence as a matter of law.

The complaint was in two counts, one of which charged against defendant certain specific acts of negligence^{by} which plaintiff was injured while in the exercise of due care. The other count was based on the theory that the negligence of defendant was willful and wanton. This count did not aver due care on the part of plaintiff. Both counts were submitted to the jury and there was some evidence from which the jury could reasonably have returned a verdict under either count. Defendant does not argue that there was no evidence tending to sustain the averments of the second count. The point, therefore, that plaintiff was guilty of contributory negligence would not, even if admitted, be controlling, nor the cases cited, such as Hooker v. Adams Express Co., 220 Ill. 122, and similar cases determinative.

The accident in which plaintiff was injured occurred about eight o'clock a. m. the morning of May 12, 1926, at the intersection

of Kenmore and Balmoral avenues in Chicago. Kenmore runs north and south, Balmoral east and west. The evidence for plaintiff tended to show that just prior to the accident plaintiff was crossing Kenmore avenue from the west side to the east; that he started from a point a few steps south of the crosswalk and walked diagonally in a northeasterly direction; that at about the time he reached the center of the street near the crosswalk he was struck and injured by a Dodge automobile driven by defendant, Frederick M. Paull, and owned by Dodge Brothers Corporation. The automobile was being driven in a southward direction, and the evidence tends to show that plaintiff was struck a little bit east of the center of Kenmore avenue. The streets at this intersection were much used; the neighborhood was densely populated. Defendant was driving on his way down town and took this particular street to save time. The evidence for plaintiff tends to show that defendant was driving at a speed of from 40 to 50 miles an hour, in disregard of the statute. Ill. State Bar Stats. 1935, sec. 49, p. 2792. Plaintiff was struck by the right front fender of defendant's automobile and was thrown southward a distance of some 25 feet or more. As defendant drove he had a clear view of plaintiff as he was crossing the street. Defendant claims he was driving at a speed of only 15 to 18 miles an hour, but the uncontradicted evidence shows that after he struck plaintiff he was unable to stop his automobile until it had moved 22 feet beyond the point of collision. The evidence of defendant indicates that although he saw plaintiff when only 50 feet away he made no effort to stop until the automobile was within a few feet of plaintiff. The evidence shows that just before striking plaintiff the automobile swerved to the left, and as a matter of fact the collision occurred a little to the left of the center of the street, indicating that defendant was driving on the wrong side. Plaintiff

of Lawrence and Belmont avenues in Chicago. Lawrence runs north and south, Belmont east and west. The evidence for Plaintiff tended to show that just prior to the accident Plaintiff was crossing Lawrence avenue from east to west; that he started from a point a few steps south of the crosswalk and walked diagonally in a northeasterly direction; that at about the time he reached the center of the street near the crosswalk he was struck and injured by a Dodge automobile driven by defendant. Frederick M. Paul, who owned the Dodge Motor Car Corporation, the automobile was being driven in a southerly direction, and the evidence tends to show that Plaintiff was struck a little bit east of the center of Lawrence avenue. The evidence at this intersection was such that; the real accident was a fairly popular one. Defendant was driving on his way down town and took this particular street to save time. The evidence for Plaintiff tends to show that defendant was driving at a speed of from 40 to 50 miles an hour, in disregard of the statute. Ill. Statute Ann. Ch. 100, sec. 49, p. 259. Plaintiff was struck by the right front corner of defendant's automobile and was thrown southward a distance of some 25 feet or more. As defendant drove he had a clear view of Plaintiff as he was crossing the street. Defendant claimed he was driving at a speed of only 15 to 18 miles an hour, but the cross-examined evidence shows that if he struck Plaintiff he was unable to stop his automobile until it had passed 25 feet beyond the point of collision. The evidence of defendant indicates that although he saw Plaintiff when only 50 feet away he made no effort to stop until the automobile was within a few feet of Plaintiff. The evidence shows that just before striking Plaintiff the automobile swerved to the left, and as a matter of fact the collision occurred a little to the left of the center of the street. Indicated that defendant was driving on the wrong side. Plaintiff

was thrown a distance of from 25 to 30 feet by the impact.

Questions of ^{the} negligence of defendant and the contributory negligence of the plaintiff under these circumstances were all for the jury, and a discussion of cases would not be helpful.

The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

was taken a distance of 100 to 150 feet by the bridge.
The sections of negligence of defendant and the contributory
negligence of the plaintiff under these circumstances were all
for the jury, and a discussion of cases would be required.
The judgment of the trial court is affirmed.
Affirmed.

O'Connor and Leggett, JJ., concur.

39424

HELEN WELLS,
Appellee,

vs.

CHICAGO MOTOR COACH COMPANY,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

291 I.A. 604²

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for injuries alleged to have been caused by the negligence of the defendant, and upon trial had a verdict for \$1000 upon which judgment was entered, and defendant appeals.

The declaration alleges that as plaintiff was boarding one of defendant's coaches it suddenly moved, throwing her to the ground. Defendant says she fell before she attempted to board the coach and as it was standing still. This presents a simple question of fact.

Plaintiff testified that a coach of the defendant was on Jackson boulevard headed westward, a foot from the north sidewalk and a short distance east of Wabash avenue; the red light on Wabash was against the Jackson boulevard westbound traffic and the coach was standing still, with about four automobiles between it and Wabash; plaintiff says that a couple of people got on the coach in front of her and she also attempted to board it; her right foot was on the step and her other foot on the curb when the coach started with a jerk, causing her to fall.

Two witnesses, one of them the driver of the coach, gave testimony for defendant tending to show that the coach did not move, as plaintiff says, but that she twisted her leg on the curbstone and fell into the doorway of the coach. The testimony of these witnesses is more or less indefinite.

HILLMAN, Appellee,
 vs.
 CHICAGO MOTOR COACH COMPANY,
 a Corporation,
 Appellant.

221 I.A. 604
 1900 ILLINOIS CIRCUIT COURT
 COOK COUNTY

MR. JUSTICE MCGOWAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for injuries
 alleged to have been caused by the negligence of the defendant, and
 upon trial had a verdict for \$1000 upon which judgment was entered,
 and defendant appeals.

The defendant alleges that as plaintiff was boarding one
 of defendant's coaches it suddenly moved, throwing her to the

ground. Defendant says she fell before she attempted to board the
 coach and as it was standing still. This presents a simple question
 of fact.

Plaintiff testified that a coach of the defendant was on
 Jackson boulevard headed westward, a foot from the north sidewalk
 and a short distance east of Webster avenue; the red light on Webster
 was against the Jackson boulevard westward traffic and the coach
 was standing still, with about four automobiles between it and
 Webster; plaintiff says that a couple of people got on the coach
 in front of her and she also attempted to board it; her right foot
 was on the step and her other foot on the curb when the coach started
 with a jerk, causing her to fall.

Two witnesses, one of them the driver of the coach, gave tes-
 timony for defendant tending to show that the coach did not move, as
 plaintiff says, but that she twisted her leg on the curb and
 fell into the doorway of the coach. The testimony of these witnesses
 is more or less indefinite.

The question of how the accident happened was properly submitted to the jury, who seeing the witnesses and hearing them testify could pass upon their credibility much better than can a reviewing court. The jury accepted the version of plaintiff as to how the accident happened, and we cannot say that it is against the manifest weight of the evidence.

At the request of plaintiff the court gave an instruction as to what was negligence on the part of the driver of the coach, closing with the words, "Provided such negligence is alleged in the complaint, as explained in these instructions, and proven by a preponderance of the evidence." The court struck out these words, and defendant argues that by so doing the right of recovery was not limited to the acts of negligence charged in the complaint. The words stricken out should properly have been left in the instruction but their deletion was not reversible error. There was only one charge of negligence made in the complaint, namely, that while plaintiff was in the act of boarding the coach it suddenly was put into motion. The jury could not possibly understand that there was any other question of negligence to be determined. Other criticisms are made which, under the circumstances, it is unnecessary to note. The question presented was a simple one of fact, and no sufficient reason is presented for reversal.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

The question of how the accident happened was properly submitted to the jury, who seeing the witnesses and hearing their testimony could pass upon their credibility much better than can a reviewing court. The jury accepted the version of plaintiff as to how the accident happened, and we cannot say that it is against the manifest weight of the evidence.

At the request of plaintiff the court gave an instruction as to what was negligence on the part of the driver of the coach, closing with the words, "Provided such negligence is alleged in the complaint, as explained in these instructions, and proven by a preponderance of the evidence." The court struck out these words and defendant argues that by so doing the right of recovery was not limited to the acts of negligence charged in the complaint. The words stricken out should properly have been left in the instruction but their deletion was not reversible error. There was only one charge of negligence made in the complaint, namely, that while plaintiff was in the act of boarding the coach it suddenly was put into motion. The jury could not possibly understand that there was any other question of negligence to be determined. Other criticisms are made which, under the circumstances, it is unnecessary to note. The question presented was a simple one of fact, and no sufficient reason is presented for reversal. The judgment is affirmed.

APPROVED.

Mathews, P. J., and O'Connor, J., concur.

OLGA M. JANELUNAS, Executrix of
Estate of KIZIMIR MULOLIS, Deceased,
Appellee,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

291 I.A. 604³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on two life insurance policies for \$500 each, issued by defendant on the life of Kazimir Mulolis. There was a verdict and judgment in plaintiff's favor for \$1245, being the face of the policies with interest, and defendant appeals.

January 23, 1931, Kazimir Mulolis executed two written applications for insurance. Three days later, January 26, the policies were issued. He died June 13, 1931; proofs of death were filed, but defendant denied liability except that it tendered back the amount of the premiums it had received, viz., \$26.63. Defendant interposed two defenses: (1) that since the policies provided that they should not take effect unless Mulolis was in sound health on the date of the delivery of the policies, and since the evidence shows that he was not in sound health on that date, there was no liability; and (2) that Mulolis "misrepresented his condition of health and prior sicknesses and medical treatments in his applications for the policies; that he did so knowing that he was not in good health and that he had been treated for diseases."

There is evidence to the effect that Mulolis consulted a physician in December, 1930, who said he was suffering from cancer of the stomach. There is further evidence to the effect that from that time until he died (June 13, 1931) his health was bad. On the other side, plaintiff's evidence tended to cast doubt as to whether

OLGA M. JAKUBOWSKI, Executrix of
Estate of KIMMIE MULLER, Deceased,
Appellee,
vs.
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a Corporation,
Appellant.

201 I.A. 604

IN THE SUPREME COURT
OF THE STATE OF NEW YORK

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action on two life insurance policies for \$500 each, issued by defendant on the life of Kimmie Muller. There was a verdict and judgment in plaintiff's favor for \$1,000. Being the face of the policies with interest, and defendant appeals.

January 23, 1931, Kimmie Muller executed two written applications for insurance. Three days later, January 26, the policies were issued. She died June 13, 1931; proofs of death were filed, but defendant denied liability except that it tendered back the amount of the premiums it had received, viz., \$50.00. Defendant interposed two defenses: (1) that since the policies provided that they should not take effect unless Muller was in sound health on the date of the delivery of the policies, and since the evidence shows that he was not in sound health on that date, there was no liability; and (2) that Muller misrepresented his condition of health and prior sicknesses and medical treatments in his applications for the policies; that he did so knowing that he was not in good health and that he had been treated for diseases.

There is evidence to the effect that Muller contracted a physician in December, 1930, who said he was suffering from cancer of the stomach. There is further evidence to the effect that from that time until he died (June 13, 1931) his health was bad. On the other side, plaintiff's evidence tended to cast doubt as to whether

the physician who testified for defendant had actually examined plaintiff in December, 1930, and further that Mulolis's health was good until some time in May, 1931.

The evidence shows that on January 23, 1931, Mulolis signed two applications for the two \$500 insurance policies in which he stated the condition of his health was good; that he had never been seriously ill; that he did not have any physical or mental infirmity and had never suffered from consumption or cancer. Three days later the two policies in suit were issued to him. April 17, 1931, Mulolis applied for two policies in the John Hancock Mutual Life Insurance company, one for \$440 and one for \$325, in which applications he made answers to questions put to him substantially the same as in the applications in the instant case. May 6, 1931, these two policies were issued to him. April 28, 1931, which was 11 days after he applied for the two policies in the John Hancock Insurance company, Mulolis applied for a policy in the Metropolitan Life Insurance company for \$506. May 11th the Metropolitan Life Insurance company issued the policy. So that between January 23, 1931, and May 11, 1931, Mulolis received five life insurance policies issued by three insurance companies, viz., The Prudential, The John Hancock, and The Metropolitan, aggregating more than \$2200. The beneficiary named in the policies issued by the Prudential company in the instant case and in the policy issued by the Metropolitan company, was the administrator or executor of Mulolis's estate, and Olga M. Janelunas, sometimes referred to as the niece of Mulolis and on another occasion as his cousin, is the executrix of the estate; she is the legatee under Mulolis's will. In the two policies issued by the John Hancock company she was named as the beneficiary. There was no medical examination of Mulolis made or required by the three insurance companies.

The burden was on defendant to prove by a preponderance of

The physician who testified that defendant had actually examined plaintiff in December, 1930, and further that Kufalia's health was good until some time in May, 1931.

The evidence shows that on January 23, 1931, Kufalia signed two applications for the two life insurance policies in which he stated the condition of his health was good; that he had never been seriously ill; that he did not have any physical or mental infirmity and had never suffered from consumption or cancer. Three days later the two policies in suit were issued to him. April 27, 1931, Kufalia applied for two policies in the John Hancock Mutual Life Insurance Company, one for \$400 and one for \$500, in which applications he made answers to questions put to him substantially the same as in the applications in the instant case. May 3, 1931, these two policies were issued to him. April 26, 1931, when was 11 days after he applied for the two policies in the John Hancock Insurance Company, Kufalia applied for a policy in the Metropolitan Life Insurance Company for \$500. May 12th the Metropolitan Life Insurance Company issued the policy. So that between January 23, 1931, and May 11, 1931, Kufalia received five life insurance policies issued by three insurance companies, viz., The Prudential, The John Hancock, and The Metropolitan, aggregating more than \$2800. The beneficiary named in the policies issued by the Prudential company in the instant case and in the policy issued by the Metropolitan company, was the administrator or executor of Kufalia's estate, and Olga Jankunas, sometimes referred to as the niece of Kufalia and on another occasion as his cousin, is the executrix of the estate; she is the legatee under Kufalia's will. In the two policies issued by the John Hancock company she was named as the beneficiary. There was no medical examination of Kufalia made or required by the three insurance companies.

The burden was on defendant to prove by a preponderance of

the evidence that Mulolis was not in "sound health" at the time the policies were delivered. Swanson v. Prudential Insurance Co., 271 Ill. App. 309. Counsel for plaintiff says in his brief, "In addition to the present cause there are two other actions on small industrial policies of later date upon the life of the insured ****. Defendant's counsel appeared in all cases and presented the same defenses and called the same material witnesses *** in each of the cases. There were verdicts for the plaintiff in the three cases. In Janelunas v. Metropolitan Life Ins. Co. *** the second division of this court reversed the judgment for the plaintiff as against the weight of the evidence and remanded the cause for a new trial. *** In Janelunas v. John Hancock Life Ins. Co., the trial Judge entered judgment for the defendant notwithstanding the verdict and plaintiff's appeal is now pending before this court." Counsel say that since three juries found for plaintiff this court will not reverse the judgment. In the appeal pending from the judgment entered by the court in the action brought on the two policies issued by the John Hancock Insurance Co. we have this day filed an opinion reversing the judgment and remanding the cause, holding that the question should have been submitted to the jury, and if the trial judge was of opinion that the verdict was ^{not} sustained by a preponderance of the evidence, he should have awarded a new trial, etc. No. 39466, Janelunas v. John Hancock Mutual Life Insurance Co. The Second division of this court in the suit brought on the policy issued by the Metropolitan Insurance company, reversed the judgment in plaintiff's favor in that case on the ground that the verdict was against the manifest weight of the evidence. The court there said: "Defendant contends that the great weight of the evidence shows that the insured on the date of the application, **** (April 28, 1931) was not in sound health, but that on said dates he was suffering from tuberculosis and cancer, which diseases had existed for a considerable

the evidence that Bullock was not in "sound health" at the time the policies were delivered. Johnson v. Prudential Insurance Co., 271 Ill. App. 309. Counsel for plaintiff says in his brief, "In addition to the present cause there are two other actions on appeal in which plaintiff's policies or later rate upon the life of the insured were Defendant's counsel appeared in all cases and presented the same before the court and called the same material witnesses as in each of the cases. There were verdicts for the plaintiff in the three cases. In Johnson v. Prudential Insurance Co., the second division of this court reversed the judgment for the plaintiff as against the weight of the evidence and remanded the case for a new trial. In Johnson v. John Hancock Life Ins. Co., the trial judge entered judgment for the defendant notwithstanding the verdict and plaintiff's appeal is now pending before this court." Counsel says that since three judges found for plaintiff this court will not reverse the judgment. In the appeal pending from the judgment entered by the court in the action brought on the two policies issued by the John Hancock Insurance Co. we have this day filed an opinion reversing the judgment and remanding the cause, holding that the question should have been submitted to the jury, and in the trial judge was of opinion that the verdict was sustained by a preponderance of the evidence, he should have awarded a new trial, etc. No. 29450, 29451, Johnson v. John Hancock Life Insurance Co. The second division of this court in the suit brought on the policy issued by the Metropolitan Insurance company, reversed the judgment in plaintiff's favor in that case on the ground that the verdict was against the manifest weight of the evidence. The court there said: "Defendant contends that the great weight of the evidence was that the insured on the date of the application, (April 28, 1931) was not in sound health, but that on said date he was suffering from tuberculosis and cancer, which diseases had existed for a considerable

period of time. After a careful consideration of all the facts and circumstances in the case we have reached the conclusion that the contention of defendant must be sustained. *** As the case may be tried again we purposely refrain from commenting upon the evidence." The judgment was reversed and the cause remanded for a new trial. (Janelunas v. Metropolitan Life Insurance Co., No. 38555.)

We have carefully considered all the evidence in the record, most of which we have not referred to, and are clearly of the opinion that the verdict and judgment, to the effect that plaintiff was in sound health on the date of the applications and on the date of the delivery of the policies, is against the manifest weight of the evidence.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur/

period of time. After a careful consideration of all the facts and circumstances in this case we have reached the conclusion that the contention of defendant must be sustained. As the case may be tried again we purposely refrain from commenting upon the evidence. The judgment was reversed and the case remanded for a new trial. (Ammons v. Kohn, 111 Cal. 2d 100, 363 P.2d 333.)

We have carefully considered all the evidence in the record, most of which we have not recited in detail, and are clearly of the opinion that the verdict and judgment, in the effect that plaintiff was in sound health on the date of the application and on the date of the delivery of the policies, is against the weight of the evidence.

The judgment of the superior court of Cook County is reversed and the cause remanded.

REVEREND AND HONORABLE

Justice W. J. ...

39404

JULIUS LIPKIN,
Appellee,
vs.
MAX ROSENTHAL,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

291 I.A. 604⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note, for \$850, made by defendant, brought suit to recover the face of the note. There was a jury trial and a verdict and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The record discloses that plaintiff's home in Chicago was subject to an encumbrance of \$5000 evidenced by a note and trust deed owned by defendant. Plaintiff was in default in payment of the indebtedness and defendant was pressing for payment. After some time plaintiff took up the matter of refinancing the loan with the Home Owners' Loan Corporation and while this was pending the H.O.L.C. agreed to make a loan of \$4800 provided plaintiff obtained some one satisfactory to the H.O.L.C. to sign the necessary papers with plaintiff. Defendant was in need of money and it seems clear the only way he could be paid was through the H.O.L.C.; he and his son from time to time importuned members of plaintiff's family to sign the papers with plaintiff so the matter might be consummated and defendant receive payment of the amount due him, or part of it. Defendant endeavored to have Maurice J. Lipkin, plaintiff's son, sign the necessary papers with his father; Maurice, in consideration of his so doing, demanded \$1500 from defendant, which was later reduced to \$850. This was agreed to and February 13, 1935, defendant executed the note in suit and it was placed in escrow with W. O. Schultz, at that time employed by the Mid-City National Bank, and a written escrow

JULIUS LIPKIN,
Appellee,
v.
MAX ROSENTHAL,
Appellant.

221 I.A. 604

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the payee of a promissory note for \$500, made by defendant, brought suit to recover the face of the note. There was a jury trial and a verdict and judgment in plaintiff's favor for the amount of his claim, and defendant appeals.

The record discloses that plaintiff's name in which was subject to an endorsement of \$500 evidenced by a note and trust deed owned by defendant. Plaintiff was in default in payment of the indebtedness and defendant was pressing for payment. After some time plaintiff took up the matter of refinancing the loan with the Home Owners' Loan Corporation and while this was pending the H.O.L.C. agreed to make a loan of \$4000 provided plaintiff obtained some one satisfactory to the H.O.L.C. to sign the necessary papers with plaintiff. Defendant was in need of money and it seems clear the only way he could be paid was through the H.O.L.C.; he and his son from time to time imported members of plaintiff's family to sign the papers with plaintiff to the matter might be consummated and defendant receive payment of the amount due him, or part of it. Defendant endeavored to have Julius J. Lipkin, plaintiff's son, sign the necessary papers with his father; however, in consideration of his so doing, defendant \$1500 from defendant, which was later reduced to \$850. This was agreed to and February 13, 1935, defendant executed the note in suit and it was placed in escrow with W. C. Schlicht, at that time employed by the Mid-City National Bank, and a written escrow

agreement was, on that day, signed by defendant and Maurice J. Lipkin, accepted by Mr. Schultz and the note delivered to him. The escrow agreement instructed Schultz to turn over the note to Julius Lipkin, the plaintiff, upon presentation of the proper certificate, issued by the H.O.L.C. showing that it had refinanced the mortgage. The deal was afterward consummated and the note delivered by Schultz to Maurice J.

The amount of the loan made by the H.O.L.C. was \$4300, of which defendant was to receive \$3300 upon delivering up the note for \$5000 and the trust deed, and this was afterward done. Plaintiff demanded from defendant payment of the note, which was refused on the ground that there was no consideration for the note. That defense was interposed.

Defendant contends there was no consideration for the note because plaintiff gave nothing for it and that Maurice Lipkin acted in the matter as agent for his father. We think this contention cannot be sustained. Defendant was pressing plaintiff for payment of his mortgage, which was in default, and when it appeared that payment would not be made unless the H.O.L.C. made a loan, which it would not do unless some one signed with plaintiff the necessary papers, defendant then solicited members of plaintiff's family to sign them with their father and agreed to pay the son, Maurice, \$850 for so doing, which was evidenced by the note and which was to be paid when the deal went through. And the evidence shows that by agreement of the parties the note was made payable to plaintiff instead of to his son, Maurice, and was delivered by Maurice, after it was received from Mr. Schultz, to his father. In these circumstances we hold there was consideration for the note and therefore there was no violation of the provisions of the H.O.L.C. act.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

agreement was, on that day, signed by defendant and Maurice J. Lipkin, accepted by Mr. Schmitt and the note delivered to him. The second agreement instructed Schmitt to turn over the note to Julius Lipkin, the plaintiff, upon presentation of the proper certificate, issued by the A.O.U.W., showing that it had relinquished the mortgage. The deal was afterwards consummated and the note delivered by Schmitt to Maurice J.

The amount of the loan made by the A.O.U.W. was \$300, of which defendant was to receive \$300 upon delivering up the note for \$500 and the first deed, and this was afterwards done. Plaintiff demanded from defendant payment of the note, which was refused on the ground that there was no consideration for the note. That defense was interposed.

Defendant contends there was no consideration for the note because plaintiff gave nothing for it and that Maurice Lipkin acted in the matter as agent for his father. We think the contention cannot be sustained. Defendant was promising plaintiff for payment of his mortgage, which was in default, and when it appeared that payment would not be made unless the A.O.U.W. made a loan, which it would not do unless one signed with plaintiff the necessary papers, defendant then solicited the father of plaintiff's family to sign them with their father and agreed to pay the son, Maurice, \$300 for so doing, which was evidenced by the note and which was to be paid when the deal went through. And the evidence shows that by agreement of the parties the note was delivered to plaintiff instead of to the son, Maurice, and was delivered by Maurice, after it was received from Mr. Schmitt, to his father. In these circumstances we find there was a valid consideration for the note and therefore there was no violation of the provisions of the A.O.U.W. act.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Ketchett, P. J., and McHenry, J., concur.

39466

OLGA M. JANELUNAS,
Appellant.

vs.

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

291 I.A. 604⁵

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff, the beneficiary of two life insurance policies issued by defendant May 6, 1931, to Kazimir Mulolis, one for \$440, and the other for \$325, brought suit to recover the amount of the two policies aggregating \$792. Defendant denied liability (except premiums paid of \$8.10) on the ground that all the evidence showed that Mulolis not only made misrepresentations as to his health in his applications for the policies but that at the time the policies were delivered he was not in sound health. There was a jury trial and a verdict in favor of plaintiff for \$990. Defendant made a motion for a new trial, and a motion for judgment in its favor notwithstanding the verdict. The court sustained the latter motion and plaintiff appeals.

The substance of the evidence is that Mulolis, who was about 46 years of age, was employed by plaintiff's husband in and about a garage, washing automobiles, etc.; that Joseph Ponelis, an agent of defendant insurance company, was soliciting insurance, procuring applications for policies, delivering them, and collecting premiums. Most of such policies were known as industrial policies and premiums were collected weekly. April 17, 1931, Ponelis solicited Mulolis for insurance at the garage where Mulolis was employed and on that date obtained from Mulolis two applications for the policies in question, in which the beneficiary was "Olga Janelunas, niece." Mulolis in answers to questions stated that he was in sound health

THE STATE OF CALIFORNIA

IN SENATE

2911 A. 604

CHAS. M. JAMNULAK, Appellant.

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a Corporation, Appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, the beneficiary of two life insurance policies issued by defendant May 6, 1931, to Joseph L. Lohia, one for \$400, and the other for \$200, brought suit to recover the amount of the two policies aggregating \$600. Defendant denied liability (except premiums paid of \$1.10) on the ground that all the evidence showed that Lohia not only made misrepresentations as to his health in his applications for the policies but that at the time the policies were delivered he was not in sound health. There was a jury trial and a verdict in favor of plaintiff for \$600. Defendant made a motion for a new trial, and a motion for judgment in its favor notwithstanding the verdict. The court sustained the latter motion and plaintiff appeals.

The substance of the evidence is that Lohia, who was about 40 years of age, was employed by plaintiff's husband in and about a garage, washing auto clothes, etc.; that Joseph L. Lohia, an agent of defendant insurance company, was soliciting insurance, procuring applications for policies, delivering them, and collecting premiums. Most of such policies were known as industrial policies and premiums were collected weekly. April 17, 1931, Lohia solicited Lohia for insurance at the garage where Lohia was employed and on that date obtained from Lohia two applications for the policies in question, in which the beneficiary was "Mrs. Lohia, nee Lohia". Lohia in answers to questions stated that he was in sound health

and that he had not within five years had any sickness and had not received any medical treatment "in any hospital, dispensary, sanitorium or other institution"; that the answers were true and complete and made to induce the defendant insurance company to enter into a contract of insurance; and "I agree that any misrepresentation *** wilfully made *** shall render the policy void, and that the policy shall not be binding upon the Company unless upon its date I shall be alive and in sound health and the premium duly paid."

May 6, 1931, Ponelis delivered the two policies in suit to Mulolis. All premiums were paid. May 9, 1931, Mulolis, on account of illness, was taken to the Cook County hospital for treatment; he was discharged May 16, 1931, and died June 13, 1931, from cancer of the liver. There is also some evidence to the effect that Mulolis had consulted a physician on December 18, 1930, that the physician diagnosed the ailment as cancer of the stomach; that between that date and the following May he had taken out other insurance, and appeared to be in good health.

The motion of counsel for plaintiff to consolidate this cause for hearing with cause No. 39306, entitled Olga M. Janelunas, Admx. of Estate of Kazimer Mulolis v. The Prudential Insurance Co. of America, was allowed. We are today filing an opinion in that case where many facts are set forth which we deem it unnecessary to repeat here.

We think the evidence as to whether Mulolis made false answers to questions put to him in the applications and whether he was in sound health on the date the policies were delivered, raised questions of fact for the jury, and the court was not warranted in entering judgment for defendant notwithstanding the verdict of the jury. Whether the court should have set aside the verdict and awarded a new trial, and whether the verdict is against the manifest

and that he had not within five years had any sickness and had not received any medical treatment "in any hospital, dispensary, sanatorium or other institution"; that the answers were true and complete and made to induce the defendant insurance company to enter into a contract of insurance; and "I agree that any such representation ** willfully made *** shall render the policy void, and that the policy shall not be binding upon the company unless upon its date I shall be alive and in sound health and the

premium duly paid."

May 6, 1931, policies delivered the two policies in suit to Nulolia. All premiums were paid. May 2, 1931, Nulolia, on account of illness, was taken to the Cook County Hospital for treatment; he was discharged May 16, 1931, and died June 16, 1931, from cancer of the liver. There is also some evidence to the effect that Nulolia had consulted a physician on December 12, 1930, that the physician diagnosed the ailment as cancer of the stomach; that between that date and the following May he had taken one other entrance, and appeared to be in good health.

The motion of counsel for plaintiff to consolidate this cause for hearing with cause No. 39308, entitled State of Illinois v. Estate of Kasimir Nulolia, was allowed. We are today filing an opinion in that case of Estate of Kasimir Nulolia v. The First National Insurance Co. of America, was allowed. We are today filing an opinion in that case where many facts are set forth which we deem it unnecessary to repeat here.

We think the evidence as to whether Nulolia made false answers to questions put to him in the applications and whether he was in sound health on the date the policies were delivered, raised questions of fact for the jury, and the court was not warranted in entering judgment for defendant notwithstanding the verdict of the jury. Whether the court should have set aside the verdict and awarded a new trial, and whether the verdict is against the manifest

weight of the evidence, obviously are questions which are not before us.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

weight of the evidence, "favorably" is a question of fact.

Page 12

2. I have also to draw attention to the fact that

10-10-68

Watch for the "Red" and "Green" signs.

THE NORTHERN TRUST COMPANY
as Trustee under the Will and
Codicil thereto of Angela C.
Gormully, Deceased, etc.,
(Appellee) Plaintiff,

vs.

VIRGINIA J. BLAKE,
(Appellee) Defendant.

MARY CUDAHY,
(Appellee) Defendant.

AMERICAN COLLEGE OF THE ROMAN CATHOLIC
CHURCH OF THE UNITED STATES, a Corporation,
(Appellant) Defendant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

291 I.A. 605¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the American College of the Roman Catholic Church of the United States, located in Rome, Italy, seeks to reverse a decree of the Circuit court of Cook county awarding Virginia J. Blake approximately \$25,000, which is represented part in securities and part in cash.

The record discloses that May 10, 1919, Angela C. Gormully of Chicago executed her last will and testament and January 15, 1920, executed a codicil to such last will and testament. She died November 8, 1920, and the will and codicil were thereafter admitted to probate by the Probate court of Cook county, Illinois.

Approximately \$500,000 was disposed of by the will and codicil. A number of specific bequests were made, including one of \$50,000 to the Northern Trust Company as trustee, to be invested by it, the net income therefrom to be paid for the support, care and education of Virginia J. Blake. By the terms of the codicil this bequest was made \$100,000. The will provided that the trustee invest the \$50,000 in safe, interest bearing securities and to and "expend/pay the net income derived therefrom for the support,

THE NORTH TRUST COMPANY
as Trustee under the will and
Codicil thereto of Virginia J.
Gormanly, Deceased, etc.,
(Appellee), Plaintiff.

vs.

VIRGINIA J. BLAKE,

(Appellee), Defendant.

MARY CUDAHY,

(Appellee), Defendant.

AMERICAN OFFICE OF THE DEAN CATHOLIC
CHURCH OF THE UNITED STATES, a corporation,
(Appellant), Defendant.

38484

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the American Catholic Church of the United States, located in Rome, Italy, seeks to reverse a decree of the circuit court of Cook county awarding Virginia J. Blake approximately \$25,000, which is represented part in securities and part in cash.

The record discloses that May 10, 1910, Virginia J. Gormanly of Chicago executed her last will and testament and January 15, 1920, executed a codicil to such last will and testament. On November 8, 1920, and the will and codicil were thereafter admitted to probate by the probate court of Cook county, Illinois.

Approximately \$500,000 was disposed of by the will and codicil. A number of specific bequests were made, including one of \$50,000 to the Northern Trust Company as trustee, to be invested by it, the net income therefrom to be paid for the support, care and education of Virginia J. Blake. By the terms of the codicil this bequest was made \$100,000. The will provided that the trustee invest the \$100,000 in safe, interest bearing securities and to "expend" pay the net income derived therefrom for the support, and

APPEAL FROM DECREE
COURT OF COOK COUNTY.

care and education of" Virginia J. Blake who was then about two and one-half years old, and that after Virginia "shall attain lawful age, such net income shall be paid over to her semi-annually for her use and support, so long as she shall live. Upon the death of said Angela (Virginia) the principal of said trust fund, and any unpaid income thereof then remaining in the hands of said Trustee shall be added to the residue of my estate, and be disposed of as hereinafter provided respecting such residue." Then followed a number of bequests and a residuary clause which also included a number of other specific bequests, and continuing the will provided "I give, devise and bequeath the remainder of such residue to the Roman Catholic North American College, at Rome, Italy, to be used and applied for the erection of a building, or addition to present buildings for the use of said college at Rome, Italy."

The codicil executed by Mrs. Gormully had only to do with the bequest to Virginia, her education and care. It provided that \$100,000 (in lieu of the \$50,000) be given to the Northern Trust Company as trustee, with directions to the Trust company "to keep the same invested in safe interest bearing securities, and to expend and pay the net income derived therefrom so far as reasonably necessary, for the support, care and education of *** (Virginia) now about three years old, *** so long as *** Angela (Virginia) shall live. *** After said Angela (Virginia) shall attain lawful age, such net income shall be paid over to her, semi-annually, for her use and support so long as she shall live. Upon the death of said Angela (Virginia) the principal of said trust fund, and any unpaid income thereof, then remaining in the hands of said Trustee, shall be added to the residue of my estate, and be disposed of as is hereinafter provided respecting such residue." The codicil further provided that in case of the death of the testatrix before Virginia should attain legal age, "my friend Miss

care and education of "Virginia L. Blake who was then about two and one-half years old, and that after Virginia "shall attain lawful age, such net income shall be paid over to her semi-annually for her use and support, so long as she shall live. Upon the death of said Angela (Virginia) the principal of said trust fund, and any unpaid income thereof then remaining in the hands of said Trustee shall be added to the residue of my estate, and be disposed of as hereinafter provided respecting such residue." It then followed a number of bequests and a residuary clause which included a number of other specific bequests, and concluding the will provided "I give devise and bequeath the remainder of such residue to the Roman Catholic North American Company, of New York, to be used and applied for the erection of a building, in addition to present buildings for the use of said college at New York, Italy."

The codicil executed by Mrs. Blake was only to be with the bequest to Virginia, her education and care. It provided that \$100,000 (in lieu of the \$50,000) be given to the Northern Trust Company as trustee, with directions to the Trust Company "to keep the same invested in safe interest bearing securities, and to expend and pay the net income derived herefrom to her as reasonably necessary, for the support, care and education of Virginia (Virginia) now about three years old, and so long as she (Virginia) shall live. After said Angela (Virginia) shall attain lawful age, and net income shall be paid over to her, semi-annually, for her use and support so long as she shall live. Upon the death of said Angela (Virginia) the principal of said trust fund, and any unpaid income thereof, then remaining in the hands of said Trustee, shall be added to the residue of my estate, and be disposed of as is hereinafter provided respecting such residue."

The codicil further provided that in case of the death of the testatrix before Virginia should attain lawful age, "my friend and

Mary Cudahy, *** shall take and have charge of said Angela (Virginia) until her majority, and that said Mary Cudahy shall be appointed Guardian of the person of said Angela (Virginia)," and act as such until said Virginia shall attain legal age.

After the will and codicil were admitted to probate Miss Cudahy apparently assumed the duties mentioned in the codicil, took charge of the child, Virginia, and from about November 8, 1920, to January 1, 1927, paid out of her own funds all costs of the child's support, and in the trial court as well as in this court disclaims any right to be reimbursed for the money so expended by her.

It further appears that from January 1, 1927, to November 25, 1934, when Virginia became 18 years of age, the trustee paid Miss Cudahy for the support of Virginia \$400 a month, or approximately \$38,000.

The Northern Trust Company as trustee filed its bill in the instant case for a construction of the will and codicil, and the only question involved on this appeal is the contest between Virginia J. Blake and the Catholic College at Rome as to which is entitled to receive the \$25,000.

After the will and codicil were admitted to probate, a bill to set aside the will and codicil was filed in the Circuit court by certain heirs of the testatrix, which was afterward compromised and settled. By the terms of the settlement the trust fund in question was reduced from \$100,000 to \$87,320.

The \$25,000 was derived by the trustee from the income on the bequest made to Virginia in the codicil, from the time of the death of Mrs. Gormully until Virginia reached the age of 18 years.

Defendant College contends that the "Testatrix did not express her intention of making a money gift to Virginia during her minority nor a gift of any unexpended net income upon attaining her majority" and in support of this counsel say that both the

Mary Oudary, *** said she had have charge of said Angela (Virginia) until her majority, and that said Mary Oudary shall be appointed Guardian of the person of said Angela (Virginia), "and not as such until said Virginia shall attain legal age.

After the will and codicil were admitted to probate, Oudary apparently assumed the duties mentioned in the codicil, took charge of the child, Virginia, and from about November 3, 1927, to January 1, 1928, paid out of her own funds all costs of the child's support, and in the trial court as well as in this court of claims any right to be reimbursed for the money so expended by her.

It further appears that from January 1, 1928, to November 25, 1934, when Virginia became 18 years of age, the trustee paid Miss Oudary for the support of Virginia \$100 a month, or approximately \$84,000.

The Fort Worth Trust Company as trustee filed its bill in the instant case for a construction of the will and codicil, and the only question involved on this appeal is the contest between Virginia J. Blake and the Catholic College of Rome as to which is entitled to receive the \$25,000.

After the will and codicil were admitted to probate, a bill to set aside the will and codicil was filed in the District court by certain heirs of the testatrix, which was afterwards compromised and settled. By the terms of the settlement the first fund in question was reduced from \$100,000 to \$67,320.

The \$25,000 was derived by the trustee from the income on the bequest made to Virginia in the codicil, from the time of the death of Mrs. Gormanly until Virginia reached the age of 18 years. Defendant College contends that the "testatrix did not

express her intention of making a money gift to Virginia during her minority nor a gift of any unexpended net income also accruing to her majority" and in support of this contention says that both the

will and codicil provide that "upon the death of Angela (Virginia) the principal of said trust fund, and any unpaid income thereof then remaining in the hands of said trustee shall be added to the residue of my estate and be disposed of as hereinafter provided respecting such residue," and that the \$25,000 in question is unpaid income within the meaning of the will and codicil and "should be added to the corpus of the trust and be distributed upon Virginia's death to the residuary legatee, as provided in the will."

Counsel for the College also say their "position is that the testatrix intended to make the entire net income of the trust available for the support, care and education of Virginia during her minority; *** that upon attaining lawful age, Virginia would be entitled to receive the entire net income of the trust so long as she shall live; that the purpose of the testatrix was to provide from the net income of the trust for Virginia's support, care and education during her minority; that it was not the intention of the testatrix to make a gift to Virginia of any unexpended income during her minority or in the hands of the trustee at the time the child attained her majority." They further say, "there is no direction or expression of intention to accumulate any part of the net income over and above the sums required for Virginia's needs. The fact that unexpended net income did accumulate during Virginia's minority was not due to any direction of testatrix but was entirely attributable to circumstances arising after testatrix' death, namely, that Miss Mary Cudahy, the testamentary guardian for Virginia, had assumed and defrayed all of the costs of the care, support and education of the child (Virginia) and had declined to accept any reimbursement for expenditures so made by her prior to January 1, 1927."

We agree with counsel that the testatrix did not intend

will and codicil provide that "upon the death of August (Virginia) the principal of said trust fund, and any unpaid income thereon then remaining in the hands of said trustee shall be paid to the residue of my estate and be disposed of as hereinafter provided respecting such residue," and that the \$25,000 in question is unpaid income within the meaning of the will and codicil and "amount be added to the corpus of the trust and be distributed upon Virginia's death to the residuary legatee, as provided in the will."

Counsel for the College also say that "condition is that the testatrix intended to make the entire net income of the trust available for the support, care and education of Virginia during her minority; ** that upon reaching majority, Virginia shall be entitled to receive the entire net income of the trust so long as she shall live; that the purpose of the testatrix was to provide from the net income of the trust for Virginia's support, care and education during her minority; that it was not the intention of the testatrix to make a gift to Virginia of any unexpended income during her minority or in the hands of the trustee at the time the child attained her majority." They further say, "whereas there is no direction or expression of intention to accumulate any part of the net income over and above the sums required for Virginia's needs. The fact that unexpended net income did accumulate during Virginia's minority was not due to any direction of testatrix but was entirely attributable to circumstances arising after testatrix' death, namely, that Miss Mary Gandy, the testamentary guardian for Virginia, had assumed and retained all of the costs of the care, support and education of the child (Virginia) and had declined to accept any reimbursement for expenditures so made by her prior to January 1, 1927."

We agree with counsel that the testatrix did not intend

to accumulate any part of the net income during Virginia's minority. There are no directions in the will or codicil for the accumulation of income to increase the corpus of the trust fund. Foss v. State Bank and Trust Co., 343 Ill. 94. But we are of opinion that a proper construction of the will and codicil requires that the \$25,000 in question be paid to Virginia upon her reaching the age of eighteen years. The codicil provides that the fund be invested by the trustee in safe, interest bearing securities, and the trustee was directed "to expend and pay the net income derived therefrom, so far as reasonably necessary, for the support, care and education of" Virginia "so long as said Angela [Virginia] shall live. * * * After said Angela shall attain lawful age, such net income shall be paid over to her, semi-annually, for her use and support so long as she shall live." We think the true meaning of the codicil is that the trustee shall expend from the income an amount reasonably necessary for the support, care and education of Virginia during her minority, and that when Virginia reached lawful age all of the net income in the hands of the trustee at that time should be paid to her. The codicil provides that after Virginia "shall attain lawful age, such net income shall be paid over to her." It does not say part of the income, and we think it means all of the income. The testatrix did not have in mind that her friend, Miss Cudahy, whom she appointed guardian of Virginia, would expend her own money to support the child, but on the contrary intended that the net income from the fund, and all of it, should be used for Virginia's support during her minority or given to her when she attained her majority. We can see no good reason why the College should receive the benefit of Miss Cudahy's generosity; she intended it for Virginia. But it is said that the will and codicil provide that upon the death of Virginia the principal of the trust fund and "any unpaid income thereof, then remaining

to accumulate any part of the net income during Virginia's minority. There are no directions in the will or codicil for the accumulation of income to increase the corpus of the trust fund. John V. Smith Bank and Trust Co., 343 Ill. 24. But we are of opinion that a proper construction of the will and official opinion that the \$25,000 in question be paid to Virginia upon her reaching the age of eighteen years. The codicil provides that the fund be invested by the trustee in safe, interest bearing securities, and the trustee was directed "to expend any part of the net income derived therefrom, so far as reasonably necessary, for the support, care and education of "Virginia" so long as said minor (Virginia) shall live. * * * After said minor shall attain lawful age, and net income shall be paid over to her, semi-annually, for her use and support so long as she shall live." We think the true meaning of the codicil is that the trustee shall expend from the income an amount reasonably necessary for the support, care and education of Virginia during her minority, and that when Virginia reached lawful age all of the net income in the hands of the trustee at that time should be paid to her. The codicil provides that after Virginia "shall attain lawful age, any net income shall be paid over to her." It does not say part of the income, and we think it means all of the income. The testatrix did not have in mind that her friend, Miss Gandy, who was appointed guardian of Virginia, would expend her own money to support the child, but on the contrary intended that the net income from the fund, and all of it, should be used for Virginia's support during her minority or given to her when she attained her majority. We can see a good reason why the College should receive the benefit of Miss Gandy's generosity; she intended it for Virginia. But it is said that the will and codicil provide that upon the death of Virginia the principal of the trust fund and "any unpaid income thereof, then remaining

in the hands of said Trustee, shall be added to the residue of my estate, and be disposed of as is hereinafter provided respecting such residue." The testatrix in the 4th and 8th clauses of her will, by which she set up two trust funds for two other beneficiaries for life, used the same language. In one of these she bequeathed to the trustee \$20,000 in trust to be invested by the trustee with directions that the trustee pay the net income therefrom, monthly, to her sister-in-law; and another bequest of \$100,000 in trust, the income of which should be paid monthly to her niece. Then follow the clauses directing that any unpaid income be added to the residue of the estate and disposed of under the residuary clause. We think these three provisions in reference to any "unpaid income" were inadvertently added. But in any event, we think the only effect that could be given to such provision of the codicil is to apply it to such current income as might accrue since the last semi-annual payment made to Virginia preceding her death.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

in the hands of said trustee, shall be added to the residue of my estate, and be disposed of as is hereinbefore provided respecting such residue." The testatrix in the 4th and 5th clauses of her will, by which she set up two trust funds for two other beneficiaries for life, named the same beneficiary. In one of these she bequeathed to the trustee \$100,000 in trust to be invested by the

trustee with directions that the trustee pay the net income therefrom, monthly, to her sister-in-law; and another bequest of \$100,000 in trust, the income of which should be paid yearly to her niece. Then follow the clauses directing that any unpaid income be added to the residue of the estate and disposed of under the residuary clause. We think these two provisions in reference to any "unpaid income" were inadvertently added. But

in any event, we think the only effect that could be given to such provision of the will is to add current income as might accrue since the last testatrix's payment made to the beneficiaries preceding her death.

The decree of the Circuit Court of Cook County is affirmed.

ROBERT WILLIAMS.

Marchetti, J. J., and Kennedy, J. J., dissent.

39454

SAUL JOSEPH and CORWIN D. QUERREY,
Administrators of the Estate of
Sherin Joseph, Deceased,

Appellees,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

291 I.A. 605²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

September 16, 1929, defendant Life Insurance company issued its two policies to Sherin Joseph, one for \$456 and the other for \$490. There was a provision in each of the policies that in case Sherin Joseph died as a result of accidental means the company would pay twice the face of the policy.

March 1, 1934, Mrs. Joseph was injured and died April 15th following. Plaintiffs, as administrators of her estate, brought suit to recover the double indemnity. Defendant Insurance company admitted its liability for the face of the two policies but denied that Mrs. Joseph died as a result of bodily injuries, taking the position that her death was caused by heart disease. There was a jury trial and a verdict and judgment in plaintiffs' favor for the amount claimed, \$946, and defendant appeals.

The record discloses that on March 1, 1934, and for some time prior, Sherwin Joseph, her son and his family were living in an apartment on the second floor of a building in Chicago. At the time Mrs. Joseph was about 53 years old, in good health, and had been performing her ordinary household duties. About 10:30 o'clock the morning of March 1st she was scrubbing the back outside stairs where, apparently, she slipped on ice, fell and was severely injured. Her daughter-in-law went to her assistance and a doctor was called. She was confined to her bed for about two weeks, then went to her

IN SENATE
OF CALIFORNIA

SENATE
JANUARY 1, 1934

SAUL JOSEPH and CORWIN D. JOSEPH,
Administrators of the Estate of
Sherrin Joseph, Deceased,
Appellants,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Respondent.

THE PRESIDING JUDGE OF THE COURT
DELIVERED THE OPINION OF THE COURT.

September 16, 1929, defendant life insurance company issued its two policies to Sherrin Joseph, one for \$450 and the other for \$400. There was a provision in each of the policies that in case Sherrin Joseph died as a result of accidental means the company would pay twice the face of the policy.

March 1, 1934, Mrs. Joseph was injured and died April 1934 following. Plaintiff, as administrators of her estate, brought suit to recover the double indemnity. Defendant insurance company admitted its liability for the face of the two policies but denied that Mrs. Joseph died as a result of bodily injuries, taking the position that her death was caused by heart disease. There was a jury trial and a verdict and judgment in plaintiff's favor for the amount claimed, \$940, and defendant appeals.

The record discloses that on March 1, 1934, and for some time prior, Sherrin Joseph, her son and his family were living in an apartment on the second floor of a building in Chicago. At the time Mrs. Joseph was about 58 years old, in good health, and had been performing her ordinary household duties. About 12:30 o'clock the morning of March 1st she was ascending the back outside stairs where, apparently, she slipped on ice, fell and was severely injured. Her father-in-law went to her assistance and a doctor was called. She was confined to her bed for about two weeks, then went to her

daughter's house on Seminary avenue, Chicago, where she stayed two weeks, being confined to her bed part of the time; she then returned to her son's apartment where she was confined to her bed most of the time until the time of her death, April 15th. During this period of about six weeks she was under the care of a doctor and apparently took a turn for the worse on the afternoon of April 14th and died the following morning.

The policy provides that if Mrs. Joseph died as the result of bodily injuries sustained "solely through external, violent and accidental means, resulting directly and independently of all other causes in the death of the insured within ninety days from the date of said bodily injuries while said policy is in force," the Insurance company would pay twice the amount of the face of the policy.

Defendant contends (1) that the "evidence shows that the insured's death was the result of heart disease and not the result of bodily injuries effected solely through external, violent and accidental means," and that the verdict and judgment in plaintiffs favor are against the manifest weight of the evidence; and (2) that the court erred in refusing to give an instruction tendered by defendant. As stated, Mrs. Joseph was 53 years of age and apparently in good health, tending to her household duties prior to the date of the accident.

Dr. Schupmann testified that he had known Mrs. Joseph about ten years; that he had seen her once in that time and had attended the rest of her family; that about six months before the accident he treated her for a cold; that on March 1st he was called to her home, found her in bed, and made a physical examination which disclosed an injury to her spine at about the fourth dorsal vertebrae; that her back was bruised and the skin showed

Hammett's house on Belmont Avenue, Chicago, where she stayed two weeks, being confined to her bed part of the time; and when returned to her son's apartment where she was confined to her bed most of the time until the time of her death, April 1934. During this period of about six weeks she was under the care of a doctor and apparently took a turn for the worse on the afternoon of April 15th and died the following morning.

The policy provides that in Mrs. Joseph died as the result of bodily injuries sustained "solely through external, violent and accidental means, resulting directly and independently of all other causes in the body of the insured within ninety days from the date of said bodily injuries while said policy is in force." The insurance company would pay to the amount of the face of the policy.

Defendant contends (1) that the "evidence and a jury the insured's death was the result of heart disease and not the result of bodily injuries sustained solely through external, violent and accidental means," and that the verdict and judgment in plaintiff's

favor are against the admitted weight of the evidence; and (2) that the court erred in refusing to give an instruction tendered by defendant. As stated, Mrs. Joseph was 53 years of age and apparently in good health, and was to her household duties prior to the date of the accident.

Dr. Schumann testified that he had known Mrs. Joseph about ten years; that he had seen her once in that time and had attended the rest of her family; that about six months before the accident he treated her for a cold; that on March 1st he was called to her home, found her in bed, and made a physical examination which disclosed an injury to her spine at about the fourth dorsal vertebrae; that her back was bruised and the skin showed

that it was of recent origin; that he found a welt on the back part of her head; that the pupils of her eyes were unequal, one larger than the other; that she showed symptoms of concussion of the brain; that, "I examined her heart. Her heart was perfectly normal. It had a little slower rate at that time due to the pressure on the brain;" that she was partially unconscious; that it required a lot of stimulant to get her to answer questions he put to her; that he ordered her to remain in bed and placed an ice bag on her head and also on her spine; that he gave her a stimulant "to get the heart to beat a little fast;" that he saw her the next day when she was able to speak and she "complained of pain in her head and spine," that he then found her heart was beating normally but her pupils were still unequal and that the bump or swelling on the back of her head was still persisting as well as the bruise on her spine; that he ordered the ice bags kept on and prescribed for her pain; that he saw her every day for about ten days and then every two or three days; that he afterward saw her three or four times at her daughter's home where she remained for about two weeks; she afterward returned to her son's home and that on one of his calls she was sitting in a chair; that he thought she was getting along pretty well until April 14th, the day before she died; that her heart was all right but the pupils were slightly unequal; that when he was called on April 14th he made an examination and found that she was dying "from a condition that we call respiratory paralysis. The center of the back part of the brain here was paralyzing the heart. The heart was all right." He was then asked his opinion as to what was the cause of her death, but the court erroneously sustained an objection to the question. Since he was the attending physician the court should have permitted the answer. Village of Chatsworth v. Rowe, 166 Ill. 114; Rowden v. Travelers Protective Assoc. of America, 201 Ill. App. 295; L.R.A.

that it was of recent origin; that he found a welt on the back
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 the court erroneously sustained an objection to the question. Since
 he was the attending physician the court should have permitted the
 answer. Village of Oyster Bay v. People, 100 Ill. 114; People v.
Travelers Protective Assoc. of America, 201 Ill. App. 323; 111 Ill. App.

1915a, p. 1062.

The Doctor was then asked an hypothetical question covering the facts in the case, and stated that in his opinion the cause of death was "paralysis of the respiratory center in her brain which prevented the muscles of breathing to act," and that in his opinion there was a causal relation between the fall on the stairs and the subsequent death. On cross-examination he said that Mrs. Joseph "died from paralysis of the brain." At this point counsel for defendant exhibited what was apparently proof of death made which bore the Doctor's signature, and counsel interrogated him, apparently endeavoring to show that the information contained in the written document was different from the testimony given by the Doctor on the trial, but the document was not put in evidence.

After the plaintiff's rested the defendant called Dr. Schupmann and interrogated him concerning the death certificate made by him. In this certificate it appeared that the principal cause of Mrs. Joseph's death was "Acute Dilation of heart," and contributory causes of importance: "Cerebral Hemorrhage due to fall occurring about Mar. 1."

The defense also called Dr. Schneider, who testified he did not know Mrs. Joseph but saw her body about a half hour after she died. He testified there was no such thing as a paralysis of the brain or respiratory paralysis of the brain. On cross-examination he testified there was a respiratory center in the brain but it was not possible for that center to be paralyzed; "That center may be affected so that it causes a paralysis of respiration;" that an injury to cause acute dilation of the heart would have to be so severe that the death would result at once.

Dr. Levinson, called by defendant, testified that he was a coroner's physician of Cook county; that he made an autopsy on the body of Mrs. Joseph on April 17th and found the mitral valves in

1915, p. 1062.

The Doctor was then asked an hypothetical question covering the facts in the case, and stated that in his opinion the cause of death was "paralysis of the respiratory center in her brain which prevented the muscles of breathing to act," and that in his opinion there was a causal relation between the fall of the stairs and the subsequent death. On cross-examination he said that Mrs. Joseph "died from paralysis of the brain." At this point counsel for defendant exhibited what was apparently proof of death made when before the Doctor's signature, and counsel interrogated him, apparently endeavoring to show that the information contained in the written document was different from the testimony given by the Doctor on the trial, but the document was not put in evidence.

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Dr. Levinson, called by defendant, testified that he was a coroner's physician of Cook county; that he made an autopsy on the body of Mrs. Joseph on April 15th and found the aortic valves in

the heart showed an old fibrous thickening which was of long duration; that the heart was diseased, and the condition was of a prolonged nature and chronic in character; that the heart condition he found was sufficient to cause death; that he found no trauma to the spinal column. The court instructed the jury that plaintiffs were not entitled to recover if Mrs. Joseph's death was caused or contributed to directly or indirectly, wholly or partially by disease or by bodily infirmity. We think the question was for the jury. The jury found in favor of plaintiffs, and upon a careful consideration of all the evidence in the record, most of which we have above discussed, we are unable to say that the finding is against the manifest weight of the evidence.

Complaint is made that the court refused the following instruction tendered by defendant: "The court instructs the jury as a matter of law that unless you believe from all the evidence that the plaintiff has submitted due proof to defendant that the insured's death resulted directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means, you must find the issues for the defendant." And it is said, "There was no evidence of proof of death by accidental means admitted or offered," and that such proof is a condition precedent to any recovery. We think there was sufficient proof made. The death certificate offered by defendant which was made out by the attending physician, Dr. Schupmann, stated in answer to a question that the principal cause of death was "acute dilation of the heart," and in answer to another printed question as to other contributory causes of importance, "cerebral hemorrhage due to fall occurring about March 1." Moreover, the defendant in its answer to plaintiffs' complaint admitted that due proof of the death of Mrs. Joseph had been made, but denied that due proof was made that Mrs. Joseph had sustained "bodily injuries solely through external,

The finding is against the plaintiff and in favor of the defendant. The jury found in favor of the plaintiff, and upon a careful consideration of all the evidence in the record, most of which we have above discussed, we are unable to say that the finding is against the plaintiff and in favor of the defendant.

Complaint is made that the court refused the following instruction tendered by defendant: "The court instructs the jury as a matter of law that unless you believe from all the evidence that the plaintiff has submitted due proof to establish that the insured's death resulted directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means, you must find the issues for the defendant."

violent and accidental means, resulting directly and independently of all other causes in the death of the insured within ninety days from the date" thereof. And defendant further states that "the said death of said SHERIN JOSEPH *** was caused by coronary Sclerosis and chronic myocarditis." This statement is not clear, but we think it means that defendant had not been furnished proof that Mrs. Joseph died as a result of bodily injuries accidentally sustained, but that on the contrary she died of heart disease. Furthermore, defendant's counsel in cross-examining Dr. Schupmann, the attending physician, apparently produced the proof of death made and interrogated the Doctor, but the document was not introduced in evidence. Moreover the instruction required the jury to find that "plaintiff has submitted due proof" that Mrs. Joseph's death resulted from accidental means. The instruction was inaccurate. Touloupas v. Equitable Life Assurance Society, 286 Ill. App. 136.

Upon a consideration of all the evidence we think the proof of accidental death was sufficient.

The judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

violent and accidental means, resulting directly and immediately
at all other causes in the death of the deceased within thirty days
from the date" thereof. The defendant's answer states that "the

said death of said JOHN JOSEPH was caused by coronary
sclerosis and chronic pyelitis." This answer is not clear,
but we think it means that defendant had not been furnished proof
that Mrs. Joseph died as a result of heart disease accidentally
sustained, but that on the contrary she died of heart disease.

Furthermore, defendant's counsel in cross-examining Dr. Thompson,
the attending physician, apparently produced the proof of death
made and interrogated the Doctor, but the document was not intro-
duced in evidence. However the instruction required the jury to
find that "plaintiff has admitted his proof" that Mrs. Joseph's
death resulted from accidental means. The instruction was inac-
curate. Longman v. Pacific Life Assurance Society, 230 P. 2d

App. 155.

Upon a consideration of all the evidence we think the
proof of accidental death was sufficient.

The judgment of the Superior Court of Cook County is
affirmed.

JUDGMENT AFFIRMED.

McGuire and Latoff, J.L. counsel.

39451

CHARLES H. COUCH,

Appellee,

vs.

CENTRAL REPUBLIC TRUST COMPANY
and FELIX ROTHSCHILD,

Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

291 I.A. 605³

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, riding in his automobile eastward on Main street in Niles Center, at the intersection with Prairie Road was struck by a northbound automobile driven by John Monsen, an employee of defendants. Plaintiff brought suit for damages and upon trial had judgment for \$225, from which defendants appeal.

Defendants filed an answer denying that they owned or operated the automobile that inflicted the damages, and the only question argued on this appeal is whether John Monsen, the driver of the automobile, was acting in the line of his employment at the time of the accident.

Defendant Central Republic Trust Company was in possession of a building in Evanston in which it operated a garage in the basement; it received the net income from the building; defendant Felix Rothschild was employed by the Central Republic Trust Company to manage the premises, and John Monsen was employed as a bookkeeper, working for both parties. Monsen testified that upon the day of the accident Mr. Rothschild told him to come back to the garage after supper to attend a meeting; that when he told Mr. Rothschild that he would have difficulty in doing this, as his own automobile was being repaired, he was told to use the automobile in the garage. His testimony was corroborated by Mr. Rothschild, who said he told Monsen to come back to work by eight o'clock that evening and to use the service car.

CHARLES H. COUGH, Appellee,
vs.
CENTRAL REPUBLIC TRUST COMPANY and FELIX ROTHSCHILD, Appellants.

2911 A. 805

MR. JUSTICE MORGAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, riding in his auto while eastward on Main street in Miles Center, at the intersection with Prairie road was struck by a northbound automobile driven by John Mosen, an employee of defendant. Plaintiff brought suit for damages and upon trial had judgment for \$225, from which defendant appealed.

Defendant filed an answer denying that they owned or operated the automobile that inflicted the damage, and the only question argued on this appeal is whether John Mosen, the driver of the automobile, was acting in the line of his employment at the time of the accident.

Defendant Central Republic Trust Company was in possession of a building in Evanston in which it operated a garage in the basement; it received the net income from the building; defendant Felix Rothschild was employed by the Central Republic Trust Company to manage the premises, and John Mosen was employed as a bookkeeper working for both parties. Mosen testified that upon the day of the accident Mr. Rothschild told him to come back to the garage after supper to attend a meeting; that when he told Mr. Rothschild that he would have difficulty in doing this, as his own automobile was being repaired, he was told to use the automobile in the garage. His testimony was corroborated by Mr. Rothschild, who said he told Mosen to come back to work by eight o'clock that evening and to use the service car.

We have here a case where Monsen was ordered to return after supper, and in order to do so was told to use defendants' automobile. The accident happened as Monsen was returning to the garage. He was then not upon any business of his own, but pursuant to the orders of his employers, was returning to the premises for the purpose of doing some work for them. The circumstances justified the court in holding that at the time of the accident Monsen, as an employee, was engaged in work for defendants.

The question whether an employee, using an automobile owned by his employer, is at the time of an accident using the vehicle for his own private uses or is acting in the course and within the scope of his employment, has been before the courts many times. The decision in each case depends upon the facts involved. Cases involving facts somewhat like those before us are Heelan v. Guggenheim, 210 Ill. App. 1, and Devine v. Ward Baking Co., 188 Ill. App. 588. In each of these cases the driver of the vehicle had for awhile used the automobile not in the line of his employment, but the accident happened as he was returning to the place where the master had instructed him to be. It was held that at the time of the accident the servant was driving the automobile in the line of his employment. Other cases to the same effect might be cited.

Defendants complain of the trial court's refusal to continue the case in order that they might introduce the testimony of another witness not present when the case was closed. The suggestion that defendants had another witness was made after both parties had closed their evidence and the court was considering its judgment. No other witness was mentioned by name nor any offer of proof made as to what the testimony of the absent witness would be. Moreover, the nature of the offered testimony appears in an affidavit attached

We have here a case where a woman was ordered to return
 after supper, and in order to do so was told to use defendant's
 automobile. The accident happened as a woman was returning to the
 garage. He was then not upon any business of his own, but pursuant
 to the orders of his employer, was returning to the garage for
 the purpose of doing some work for them. The circumstances just-
 ified the court in holding that at the time of the accident woman
 as an employee, was engaged in work for defendant.
 The question whether an employee, using an automobile owned
 by his employer, is at the time of an accident using the vehicle
 for his own private uses or is acting in the course and within the
 scope of his employment, has been before the courts many times.
 The decision in each case depends upon the facts involved. Cases
 involving facts somewhat like those before us are Reid v. Guggen-
heim, 210 Ill. App. 1, and Payne v. Ford Baking Co., 188 Ill. App.
 588. In each of these cases the driver of the vehicle had for
 awhile used the automobile not in the line of his employment, but
 the accident happened as he was returning to the place where the
 master had instructed him to be. It was held that at the time of
 the accident the servant was driving the automobile in the line of
 his employment. Other cases to the same effect might be cited.
 Defendant's complaint of the trial court's refusal to continue
 the case in order that they might introduce the testimony of another
 witness not present when the case was closed. The suggestion that
 defendant had another witness was made after both parties had
 closed their evidence and the court was considering its judgment.
 No other witness was mentioned by name nor any offer or proof made
 as to what the testimony of the absent witness would be. Moreover,
 the nature of the offered testimony appears in an affidavit attached

to defendants' motion for a new trial. The proposed witness was a fellow employee of Monsen and his testimony would not have affected the proof that Rothschild gave Monsen permission to use defendants' automobile. There was no abuse of judicial discretion in this respect.

The evidence justified the judgment and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

to defendant's motion for a new trial. The proposed witness was a fellow employee of Cohen and his testimony would not have affected the jury's verdict. There was no error in the admission of the testimony. The evidence in this respect.

The evidence justified the verdict and it is affirmed.

REVEREND

O'Connor, J., and McKeown, J., concur.

39331

ELIZABETH M. RICHARDSON, Administratrix
of the Estate of William J. Richardson,
Deceased, and ELIZABETH M. RICHARDSON,
Administratrix of the Estate of William
J. Richardson, Deceased, as assignees of
George H. Boyde,

Appellees.

vs.

SUBSCRIBERS AT THE INTER-INSURANCE
EXCHANGE OF THE CHICAGO MOTOR CLUB, and
MOTOR CLUB SERVICE CORPORATION, Attorney-
in-fact for Subscribers at the Inter-
Insurance Exchange of the Chicago Motor Club,
Appellants.

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

291 I.A. 606¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment for \$5790 entered on the finding of the court.

August 28, 1929, an automobile owned by Ione Cannon Boyde was being driven in an easterly direction on Oakwood boulevard by the husband of the owner, George H. Boyde. At the intersection of Langley avenue and Oakwood boulevard the automobile struck and killed William J. Richardson, a pedestrian who was crossing the boulevard. Elizabeth M. Richardson, the widow and administratrix of deceased, sued Ione Cannon Boyde and George H. Boyde under the statute for alleged negligence resulting in the wrongful death of her intestate. Ione Cannon Boyde died prior to the trial of the suit. March 25, 1933, the administratrix recovered judgment against George H. Boyde for \$5000. Boyde prayed an appeal to the Appellate court but never perfected his appeal, and the judgment remains unsatisfied.

June 9, 1933, Mrs. Richardson as administratrix filed her suit in the Circuit court in assumpsit against the defendants to recover the amount of her judgment against George H. Boyde. The basis of her suit is an insurance policy issued by defendant to

INVESTIGATION OF THE CHARGE OF
INFLUENCE EXERCISE BY THE CHARGE
IN-1-01 FOR SUBSCRIBERS AT THE INTER-
POLICE CLUB MEETING OF 1941, ATTORNEY-
EXAMINER OF THE CHARGE OF 1941, AND
SUBSCRIBERS AT THE INTER-1941.

This is an official record of the United States Government.

entered on the list of the court.

August 20, 1944, in State of life owned by Irene Jackson Lohde

the husband of the car, last night, at the intersection of
was being driven in an easterly direction on a road bounded by

[illegible]

Killed William J. Richardson, a scientist in the gas research lab.

100-443887-100

and return about ... to the ... of the ... to

statute for alleged negligence resulting in the death of a child.

her intestate. Love Union Agency prior to the trial of the

swit. March 25, 1955, the child was recovered from the

George A. Boyde for \$200.00. Boyde placed an appeal to the Sheriff.

court but never participated in the same, and in fact was not even

.d9 i'ta i'tsa

June 8, 1933, Mr. Nicholas is admitted to the

et atque totum est tantum quinquaginta et tres dies et tria

RECOVERED TO JAMES EARL RAY

transmitted to the other person as a result of the first

Ione Cannon Boyde, prior to the accident, in which deceased was killed, and which policy was in force at that time. Plaintiff's declaration averred the issue of this insurance policy, the occurrence in which Richardson was killed, the recovery of judgment by the administratrix on March 25, 1933, the defense of that suit by defendants according to the terms of the policy. The declaration also averred that Boyde is insolvent, that under the terms of the policy defendant is obliged to pay to plaintiff the amount of the judgment, which it has refused to do. Defendants filed pleas of the general issue and special pleas to the effect that neither of the Boydes had complied with conditions precedent of the policy as to giving notice of the accident and claim or delivery of summons, and in particular that Ione Cannon Boyde and George H. Boyde had not complied with the cooperative clause of the policy, in that George H. Boyde did not prior to the trial furnish his address to defendants nor advise them as to where he could be communicated with and was absent from the trial, thus contributing to the adverse verdict. By another special plea defendants averred that plaintiff had no right of action because she was not a party to the contract of insurance, and that it did not inure to her benefit. Additional counts were filed to the declaration, demurrers to which were sustained. The plaintiff on June 8, 1936, filed a second amended additional count to which defendants demurred, but their demurrer was overruled. In addition to facts theretofore averred this second amended additional count alleged that George H. Boyde assigned to Mrs. Richardson, as administratrix, all his right of action against defendants under the insurance policy; that George H. Boyde, at the time of the accident, ever since and now, has been insolvent and unable to pay the judgment and by virtue of the terms of the policy the insolvency or bankruptcy of the insured did not release the defendants from the payment of damages sustained; that

...in which occurred the
killed, and which policy was in force at that time. Plaintiff's
declaration averred the issue of this insurance policy, the co-
currence in which Richardson was killed, the recovery of judgment
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to the contract of insurance, and that it did not inure to her
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of action against defendants under the insurance policy; that George
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insolvent and unable to pay the judgment and by virtue of the terms
of the policy the insolvency or bankruptcy of the insured did not
release the defendants from the payment of damages sustained; that

by the terms of the policy George H. Boyde, in the event of the failure of defendants to pay the judgment, had the right to bring suit for the amount of the judgment, interest and costs, even though the insured was insolvent or bankrupt, so long as the accident happened during the life of the policy; that the assignment of his right of action to Mrs. Richardson, as administratrix, was made by George H. Boyde in April, 1933; that at the same time and place George H. Boyde gave to the administratrix the right to proceed to recover said judgment in his name. It was alleged this assignment and right to proceed was given through W. J. Berg, an authorized agent of the administratrix, as a voluntary oral grant; that thereafter the administratrix was the actual bona fide owner of the assignment of the right of action and had the right to proceed under the name of George H. Boyde; that by reason of the foregoing the administratrix became subrogated to the rights of Boyde to recover against defendants. Defendants pleaded that plaintiffs had not complied with the clause of the policy relating to assignment of interest; that the cause of action set forth in the second amended additional count was barred by ^atwo year limitation clause of the policy; that plaintiff Richardson, as administratrix and as assignee, had not complied with section 4 of the Statute of Frauds; that George H. Boyde at no time made any assignment of his interest or any transfer of a right of subrogation; that there was no consideration for an assignment of his interest or a transfer of any right of subrogation. Other pleas denied that defendants authorized their attorneys to defend the suit brought by the administratrix against the Boydes; averred that George H. Boyde had no claim, right, interest or cause of action which he could transfer or assign; that plaintiff, suing as administratrix and as assignee, was prosecuting her suit in inconsistent capacities; that the automobile involved in the accident was not the automobile mentioned

by the terms of the policy George A. Boyde, in the event of the failure of defendant to pay the insurance, had the right to bring suit for the amount of the judgment, interest and costs, even though the insured was involved or bankrupt, so long as the accident happened during the life of the policy; that the assignment of his right of action to Mrs. Nicholson, as administratrix, was made by George A. Boyde in April, 1933; that at the same time and place George A. Boyde gave to the administratrix the right to proceed to recover said judgment in his name. It was alleged that assignment and right to proceed was given through G. L. Berg, an authorized agent of the administratrix, as a voluntary oral grant; that thereafter the administratrix was the actual owner and holder of the assignment of the right of action and had the right to proceed under the name of George A. Boyde; that by reason of the foregoing the administratrix became subrogated to the rights of Boyde to recover against defendant. Defendant pleaded that plaintiff had not complied with the clause of the policy relating to assignment of interest; that the cause of action set forth in the second amended additional count was barred by two year limitation clause of the policy; that plaintiff, administratrix, as administratrix and as assignee, had not complied with section 4 of the State of Nevada; that George A. Boyde at no time made any assignment of his interest or any transfer of a right of subrogation; that there was no consideration for an assignment of his interest or a transfer of any right of subrogation. Other pleas denied that defendant authorized their attorneys to defend the suit brought by the administratrix against the boyes; further that George A. Boyde had no claim, right, interest or cause of action which he could transfer or assign; that plaintiff, being an administratrix and as assignee, was prosecuting her suit in her own right and capacity; that the mobile involved in the accident was not the automobile mentioned

in the policy of insurance; that George H. Boyde was not driving it with the permission of the insured; also denied that George H. Boyde was insolvent; denied that the policy had been lost or that it was ever delivered to W. J. Berg or the administratrix. The cause was tried by the court without a jury. Propositions of law and fact were submitted by defendants, and the ruling of the court thereon obtained. July 16, 1936, the court found the issues for the plaintiffs, Elizabeth M. Richardson, administratrix of the estate of William J. Richardson, deceased, and Elizabeth M. Richardson, administratrix of the estate of William J. Richardson, deceased, as assignee of George H. Boyde, and against the defendants, Subscribers at the Inter-Insurance Exchange of the Chicago Motor Club and Motor Club Service Corporation, attorney-in-fact for Subscribers at the Inter-Insurance Exchange of the Chicago Motor Club, and entered judgment for \$5790, to reverse which this appeal has been perfected.

It is contended in behalf of defendants that the plaintiff administratrix had no direct right of action against defendants; that her action as assignee under the second amended additional count was subject to the limitation clause contained in the policy of insurance; that George H. Boyde breached the cooperation clause of the insurance policy in such manner as to create a complete defense to the suit.

The first question presented is whether the administratrix has a direct right of action against defendants. That question must be determined from an examination of the terms of the policy. The general rule of course is, that only parties to a contract can sue on it. Many States, however, including Illinois, recognize an exception in that a third party for whose benefit a promise is made may maintain an action against the maker of such a promise. This exception is especially applicable to actions upon insurance contracts, which now usually provide that in case of the insolvency or bankruptcy of the insured the judgment creditor or injured person may sue the in-

The policy of insurance; and George E. Boyle was not holding it with the permission of the insured; also holding that George Boyle was innocent; decided that the policy had been lost or lost it was never delivered to W. J. Berg or the administrator. The cause was tried by the court without a jury. Proceedings at law and fact were submitted by defendants, and the ruling of the court thereon obtained. July 18, 1936, the court found the issues for the plaintiffs, Elizabeth A. Richardson, administrator of the estate of William J. Richardson, deceased, and Elizabeth A. Richardson, administratrix of the estate of William J. Richardson, deceased, as assignees of George E. Boyle, and against the defendant, administrators at the Inter-Inurance Exchange of the Chicago Motor Club and Motor Club Service Corporation, attorney-in-fact for defendants at the Inter-Inurance Exchange of the Chicago Motor Club, and entered judgment for \$2700, to reverse which this appeal has been instituted.

It is contended in behalf of defendants that the plaintiff administratrix has no direct right of action against the insurer; that her action as assignee under the second amended additional contract was subject to the limitation of time contained in the policy of insurance; that George E. Boyle procured the execution of the insurance policy in such manner as to create a conflict between the suit.

The first question presented is whether the administratrix has a direct right of action against the insurer. That question must be determined from an examination of the terms of the policy. The general rule of course is, that only parties to a contract can sue on it. Many states, however, including Illinois, recognize an exception in that third party for whose benefit a promise is made may maintain an action against the maker of such a promise. This exception is especially applicable to policies upon insurance contracts, which now usually provide that in case of the insolvency or bankruptcy of the insured the judgment creditor or injured person may sue the in-

insurance company directly. In most of the States it is now so provided by statute. Illinois has such statute. (Ill. State Bar Stats., 1935, chap. 73, p. 1915.) This statute, however, was not enacted when the insurance policy here in question was written and is therefore not applicable. Insurance contracts of this kind fall into two classes distinguished with respect to the persons who may avail themselves of the benefits thereof. These are, first, contracts of "indemnity." That is, contracts in which recovery is limited to the actual financial loss which the insured has incurred. Under such contracts only the insured can maintain suit, and the plaintiff in order to recover must have actually paid the loss. Such contracts usually contain a no-action clause, so called, which expressly provides that no person other than the insured shall maintain any action thereon. The other class are known as "liability" contracts. In these the insurance company is liable both to the insured and to the person injured whenever the amount of the loss has been adjudicated. These liability contracts usually contain an "insolvency" clause, which in substance provides that the rights of the insured shall not pass to any trustee in bankruptcy, and that the judgment creditor, that is the injured party, shall have a right of action against the insurance company for the amount of his judgment to the extent that the same is covered by the policy and unpaid.

In the first class of cases the courts of Illinois have held that the judgment creditor has no right of action except by way of garnishment or creditor's bill. Illustrative of this class are the cases of Berkemeier v. Dormuralt Motor Sales, Inc., et al., 263 Ill. App. 211; Kinnan v. Hurst, 317 Ill. 251, and Illinois Tunnel Company v. General Accident Fire & Life Ins. Co., 219 Ill. App. 251. The question for determination here is to which class does the insurance contract upon which the suit is based belong.

insurance company directly. In most of the states it is now so provided by statute. Illinois has a such statute. (Ill. State Bar State., 1935, chap. 73, § 1912.) This statute, however, was not enacted when the insurance policy here in question was written and is therefore not applicable. Insurance contracts of this kind fall into two classes distinguished with respect to the persons who may avail themselves of the benefits thereof. These are, first, contracts of "indemnity." That is, contracts in which recovery is limited to the actual financial loss which the insured has incurred. Under such contracts only the insured can maintain suit, and the plaintiff in order to recover must have actually paid the loss. Such contracts usually contain a co-action clause, so called, which expressly provides that no person other than the insured shall maintain any action thereon. The other class are known as "liability" contracts. In these the insurance company is liable both to the insured and to the person injured whenever the amount of the loss has been adjudicated. These liability contracts usually contain an "insolvency" clause, which in substance provides that the rights of the insured shall not pass to any trustee in bankruptcy, and that the judgment creditor, that is the injured party, shall have a right of action against the insurance company for the amount of his judgment to the extent that the same is covered by the policy and unpaid.

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The question for determination here is to which class does the insurance contract upon which the suit is based belong.

The contract is in evidence. It is limited in amount to \$5000 for any one person injured and purports by clause 1 to insure the subscriber owner of an automobile "against the following losses:"

"Liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered or alleged to have been suffered while this contract is in force, including death resulting at any time therefrom, by any person or persons, not employed by the Assured, by reason of the ownership, maintenance or use of any of the automobiles as enumerated and described in said schedule."

Clause 2 provides for similar insurance on account of damage to or destruction of property. There is another clause for "Additional Assured," which provides the policy -

"Shall insure to the benefit of any person or persons while riding in or lawfully operating any of the automobiles described in the schedule, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named Assured, or, if the named Assured is an individual, with the permission of an adult member of the Assured's household other than a chauffeur or a domestic servant; provided, however, that such insurance and the provisions of Clause six (6) shall not inure to the benefit of any owner, agent or employee of any automobile repair shop, automobile sales agency or automobile service station."

All the agreements of the policy are made subject to conditions which it provides "shall be construed as conditions precedent." The particular condition which must here be construed is set forth in clause "G" :

"No action shall be maintained against the Exchange under this contract for any loss or damage suffered by the Assured arising out of damage to the property of others or injury to (or death resulting therefrom) the persons of others, or expense incurred in defending suits against the Assured unless brought after the liability of the Assured and amount of damage to such property or injury to (or death resulting therefrom) the persons of others shall have been fixed either by a final judgment against the Assured by the court of last resort after trial of the issue or by agreement between the parties with the written consent of the Exchange. If the amount of any such judgment be within the limit of liability of the Exchange under this contract, the Exchange shall be bound to protect the Assured against the levy of execution issued on such judgment and for that purpose may procure the satisfaction of record of such judgment and thereby discharge its liability under this contract for the loss or damage for which such judgment was recovered. If the amount of any such judgment be in excess of the limit of liability of the Exchange, the Exchange may discharge its liability to the Assured for the loss or damage for which such judgment was recovered, by paying the amount of the liability of the Exchange under this contract either to the

The contract is in evidence. It is limited in amount to

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"Liability imposed by law upon the assured for damages on account of bodily injuries accidentally sustained or alleged to have been sustained while this contract is in force, including death resulting at any time thereafter, by any person or persons, not employed by the Assured, by reason of the ownership, maintenance or use of any of the automobiles as enumerated and described in this schedule."

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"Additional Assured," which provides the policy -

"I shall insure to the benefit of any person or persons while living in or lawfully operating any of the automobiles described in the schedule, and to any person, firm or corporation lawfully responsible for the operation thereof, provided such use or operation is with the permission of the named Assured, or, if the named Assured is an individual, with the permission of an adult member of the Assured's household other than a child or a domestic servant; provided, however, that such insurance and the provisions of Clause six (6) shall not inure to the benefit of any owner, agent or employee of any automobile repair shop, automobile sales agency or automobile service station."

All the agreements of the policy are made subject to condi-

tions which it provides "shall be construed as conditions precedent."

The particular condition which must here be construed is set forth

in clause "9" :

"No action shall be maintained against the Assured under this contract for any loss or damage suffered by the Assured arising out of damages to the property of others or injury to (or death resulting from) the persons of others, or expense incurred in defending suits against the Assured unless brought after the liability of the Assured and amount of damage to such property or injury to (or death resulting therefrom) the persons of others shall have been fixed either by a final judgment or by agreement between the parties resort to trial of the issue or by agreement between the parties with the written consent of the Assured. If the amount of any such judgment be within the limit of liability of the Assured under this contract, the Assured shall be bound to protect the Assured against the levy of execution issued on said judgment and to that purpose pay over the satisfaction of record of such judgment and to the Assured its liability under this contract for the loss or damage for which such judgment was rendered. If the amount of any such judgment be in excess of the limit of liability of the Assured, the Assured may discharge its liability to the Assured for the loss or damage for which such judgment was recovered, by paying the amount of the liability of the Assured under this contract in respect to the

Assured or to the owner or owners of such judgment in part satisfaction thereof, at the election of the Exchange. The insolvency or bankruptcy of the Assured shall not release the Exchange from the payment of loss sustained by damage to the persons or property occasioned during the life of this contract. In no event shall any action be maintained against the Exchange under this contract unless brought within two years after right of action accrues, provided, however, that if any time limitation of this contract, with respect to giving notice or instituting suit, conflicts with the law controlling this contract, the minimum period permitted by such law shall be considered as substituted for such limitation. No action shall be brought by the Assured against the Exchange upon or by reason of this contract for any loss or damage to any automobile described in the schedule hereto, occasioned by fire, theft or collision, until sixty (60) days after the rendering by the Assured of the Assured's sworn statement of loss nor unless such action be brought within one year after the occurrence of such loss or damage."

In construing this contract we first notice the absence of the "No-action clause" usually contained in "indemnity" contracts. It is also to be noticed that in the first clause of Section G there is nothing that requires the suit to be brought by the assured only, nor for reimbursement only, nor requirement that the assured shall sustain a loss by actual payment of the judgment in money. The first clause seems to leave the way open for suit by anyone to whom a promise has been made in the policy. The only condition precedent to such suit is that there must be a final judgment. By the second clause the Insurance company binds itself to protect the assured against the levy of an execution issued on the judgment. Here again the assured is not required to pay the judgment and sustain a loss before bringing suit on the policy. On the contrary, the insurer binds itself to pay the judgment and protect the assured against an execution. By another clause of paragraph G it is provided in substance that if the amount of the judgment is in excess of the limit of liability of the company it may pay the amount of such liability either to the assured or to the owner or owners of the judgment, in part satisfaction thereof at its election. Here again there is no requirement of prepayment by the assured, and there is nothing requiring

the assured to pay or sustain loss. The principal clause of "G" relied on by plaintiff is the clause with reference to insolvency. This clause seems to show the intention of the parties that the insurer shall pay at all events. It seems to exclude the thought of indemnity from the policy. It provides that if the assured is insolvent or bankrupt the insurer will pay the loss in any event without indemnification. Paragraph G seems to contain all the usual provisions of "liability" contracts with the exception that it contains no express provision to the effect that such injured person shall have the right to sue directly. Defendants review in detail many cases cited by plaintiff showing that all are distinguishable upon this ground. The question therefore seems to narrow itself down to this, whether the lack of such a clause in the insurance contract precludes direct suit by the injured party. The general rule is that such a contract is construed most strongly against the company and liberally in favor of the assured. The rule is reasonable and its application brings about just results. The trial Judge construed these promises as being for the benefit of plaintiff and held that she had a right to sue thereon. The trial Judge pointed out that a construction that the contract was only one of indemnity rendered much of the language of clause G useless and without effect or meaning. He said clause G was just as clearly a provision for the benefit of the injured person as if his name had been written in the contract and known in advance. We hold plaintiff could sue directly on the policy.

Plaintiff, however, does not rely alone upon her right to bring a direct suit on the policy. By the second amended additional count filed February 8, 1936, she averred the assignment to her by George H. Boyde of his rights in the policy. Boyde was by reason of his relationship to his wife under the terms of the contract a party to it. Defendants, however, contend that assuming

a valid assignment to plaintiff, she could not recover on it by reason of the provision in the contract that in no event can an action be maintained unless brought within two years after the action accrued. The final judgment against Boyde was entered March 25, 1933, and Boyde's right of action arose on that date. The second amended additional count was filed February 8, 1936. If this provision of the policy was applicable the time limited for bringing action by George H. Boyde expired March 25, 1935. Boyde by an assignment could not, defendants say, transfer to the administratrix a better cause of action than he had. To this point defendants cite cases such as Bass v. Standard Accident Insurance Company of Detroit, Michigan, 70 Fed. (2d) 86, which holds to the effect that in such a case the limitation begins to run from the date the judgment against the defendants in the original suit is obtained. Defendants say that the filing of a second amended additional count was merely an attempt to engraft a new suit on a dead one, and that in effect it not only added to new parties plaintiff, but added parties who stood in inconsistent relationships - namely, the administratrix, claiming a direct right of action, claiming as an alleged assignee and also as an alleged subrogee. Under Rule 1 of the Supreme court it is claimed the pleadings were controlled by the Practice act of 1907, since the original parties had filed their pleadings prior to January 1, 1934. We will assume this to be correct. Under the old Practice Act, defendants say there could not be more than one plaintiff unless the co-plaintiffs had a joint interest, and parties whose interests were inconsistent absolutely could not sue together in the same action. They say the first declaration of the administratrix did not state a cause of action, and if the second amended count stated a cause of action for the first time, then the suit was begun 15 months after the time limited for filing it and the

was begun 15 months after the time limited for filing it and the count stated a cause of action for the first time, then the writatrix did not state a cause of action, and in the second amended the same action. They say the first declaration of the writatrix was inconsistent absolutely could not be together in interests unless the co-defendants had a joint interest, and parties whose Act, defendants say there could not be more than one plaintiff. 1934. We will assume this to be correct. Under the old practice the original parties had filed their pleadings prior to January 1, 1907, since the pleadings were controlled by the practice act of 1907, since alleged subrogee. Under Rule 1 of the supreme court it is claimed right of action, claiming as an alleged assignee and also as an relationships - namely, the administratrix, claiming a direct new parties plaintiff, but added parties who stood in inconsistent a new suit on a dead one, and that in effect it not only added to second amended additional count was merely an attempt to engraft original suit is obtained. Defendants say that the filing of a run from the date the judgment against the defendant in the holds to the effect that in such a case the limitation begins to Insurance Company of Detroit, Michigan, 70 Fed. (2d) 36, which point defendants cite cases such as Moss v. Standard Accident Administratrix a better cause of action than he had. As this Boyde by an assignment could not, defendants say, transfer to the for bringing action by George W. Boyde expired March 28, 1933. If this provision of the policy was applicable the time limited The second amended additional count was filed February 8, 1935. March 28, 1933, and Boyde's right of action arose on that date. action occurred. The first judgment against Boyde was entered action be maintained unless brought within two years after the reason of the provision in the contract that in no event can a valid assignment to plaintiff, and could not recover on it by

right of action was barred. Defendants say it is well settled in Illinois that the statement of a cause of action for the first time, when, as a matter of fact, a statute of limitations has run, is subject to a plea of the statute. Day, Ex. v. Talcott, 361 Ill. 437, and McAndrews v. The Chicago Lake Shore and Eastern Ry. Co., 222 Ill. 232, are cited. They say, moreover, that an assignee could not sue at common law; that the right of the administratrix to sue as assignee is derived from Section 18 of the Practice act, in force prior to January 1, 1934, re-enacted as Section 22 of the Civil Practice act; that before the enactment of Section 18 no cause of action existed in favor of the assignee of a chose in action; that the cause of action set forth in the original declaration is not identical with that set forth in the second amended count; that the original declaration set forth a common law action in assumpsit, while the assignee at common law had no such right; that the second amended additional count is, therefore, based entirely on Section 18 of the former Practice act; that the same evidence will not support a judgment under both pleadings, and that a plea of res adjudicata based on this judgment could not be interposed to another suit because the administratrix sues in different capacities, namely, as administratrix and as assignee. Defendants cite Carlin, Adm'x v. The City of Chicago, 262 Ill. 564, and Keslick, Adm'x v. Williams Oil-O-Matic Heating Corporation, 277 Ill. App. 263. The court refused to hold propositions in harmony with these contentions. If, as a matter of fact, we are right in our conclusion that Mrs. Richardson had a right to sue directly upon the policy, then these contentions are without merit. On this point the real question seems to be whether the cause of action brought by the administratrix and set forth in her original declaration is the same cause of action set up in the second amended additional

right of action was barred. Defendant says it is well settled in Illinois that the statement of a cause of action for the first time, when, as a matter of fact, a statute of limitations has run, is subject to a plea of the statute. Day, v. Walcott, 301 Ill. 437, and Williams v. The Chicago News, 301 Ill. 437, 232 Ill. 232, are cited. They say, moreover, that an assignee could not sue at common law; that the right of the administratrix to sue as assignee is derived from section 18 of the Practice act, in force prior to January 1, 1934, re-enacted as section 22 of the Civil Practice act; that before the enactment of section 18 no cause of action existed in favor of the assignee of a chose in action; that the cause of action set forth in the original declaration is not identical with that set forth in the second amended count; that the original declaration set forth a common law action in assumpsit, while the assignee at common law had no such right; that the second amended additional count is, therefore, based entirely on section 18 of the former Practice act; that the same evidence will not support a judgment under both pleadings, and that a plea of res adjudicata based on this judgment could not be interposed to another suit because the administratrix sues in different capacities, namely, as administratrix and as assignee. Defendant cites Carlin, Adm'r v. The City of Chicago, 303 Ill. 584, and Realick, Adm'r v. Williams (Ill-Gastic Heating Corporation), 307 Ill. App. 203. The court refused to hold propositions in harmony with these contentions. It, as a matter of fact, we are right in our conclusion that Mrs. Richardson had a right to sue directly upon the policy, then these contentions are without merit. On this point the real question seems to be whether the cause of action brought by the administratrix and set forth in her original declaration is the same cause of action set forth in the second amended additional

count. If an amended declaration sets up the same cause of action, it is not vulnerable to a plea of the Statute of Limitations or similar plea. Columbia Three Color Co. v. Aetna, 183 Ill. App. 384; Zister v. Pollock, 262 Ill. App. 170. Amendments may add parties, take away parties without stating a new cause of action such as will subject the declaration to a bar of the Statute of Limitations provided for by the policy. United States Ins. Co. v. Ludwig, 108 Ill. 514-517. In Beresch v. Knights, 255 Ill. 122-127, it was held that the substitution of the real beneficiaries for supposed beneficiaries who had brought an action on a life insurance policy was not the beginning of a new action such as would subject the new plaintiffs to be barred by a Statute of Limitations. In Redlowski v. Grosfeld, 192 Ill. App. 534, it was held that the substitution of the right plaintiff instead of the wrong one was permissible, and this notwithstanding Zukowski v. Armour, 107 Ill. App. 663, and Henry v. Seaton, 170 Ill. App. 1, which cases were disapproved as being contrary to the decisions of the Supreme court. In C. & O. Ry. Co. v. Fish, 170 Ill. App. 359, this court, construing Section 24 of the then Practice act, held that it was to be liberally construed, reviewed the cases and said that the mere change of parties plaintiff "does not of itself change the cause of action." In Thomas v. Fame Ins. Co., 108 Ill. 91, Thomas was substituted instead of two plaintiffs, and the defendant interposed a special plea that the policy provided that the suit must be brought within 12 months, which time had elapsed when the substitution was made. The court said that there was no change in the cause of action; that the object of the suit was the same after the amendment as before; that it was a matter of total indifference to the defendant company whether the recovery was in the name of the original plaintiffs or in the name of Thomas for their use.

count. If an amended declaration sets up the same cause of action, it is not vulnerable to a plea of the statute of limitations or similar plea. Columbia Trust Co. v. Aetna, 133 Ill. App. 384; Walter v. Pollock, 283 Ill. App. 170. A defendant may add parties, take away parties without stating a new cause of action such as will subject the declaration to a bar of the statute of limitations provided for by the policy. United States Ins. Co. v. Lusk, 108 Ill. 514-517. In Barnes v. Lusk, 255 Ill. 142-147, it was held that the substitution of the real beneficiaries for supposed beneficiaries who had brought an action on a life insurance policy was not the beginning of a new action and as would subject the new plaintiffs to be barred by a statute of limitations. In Redowski v. Grosfeld, 192 Ill. App. 804, it was held that the substitution of the right plaintiff instead of the wrong one was permissible, and this notwithstanding Wheeler v. Lincoln, 107 Ill. App. 683, and Ferry v. Weston, 171 Ill. App. 1, which cases were disapproved as being contrary to the decisions of the supreme court. In C. & O. Ry. Co. v. Rich, 170 Ill. App. 352, this court, construing section 24 of the then practice act, held that it was to be liberally construed, reviewed the cases and said that the mere change of parties plaintiff "does not of itself change the cause of action." In Thomas v. Fane Inc. Co., 103 Ill. 91, Thomas was substituted instead of two plaintiffs, and one defendant interposed a special plea that the policy provided that the suit must be brought within 18 months, which time had elapsed when the substitution was made. The court said that there was no change in the cause of action; that the object of the suit was the same after the amendment as before; that it was a matter of formal interposition to the defendant company whether the recovery was in the name of the original plaintiffs or in the name of Thomas for their use.

In Fidelity and Casualty Co. v. Freeman, 109 Fed. 847, an administrator sued on an insurance policy and afterward a will of the deceased was found and admitted to probate, and the executor named in the will was substituted as plaintiff. It was held that the suit by the executor was not subject to a plea of the Statute of Limitations. So here, we think these defendants are not concerned with the names of plaintiffs which appear in the declaration or whether any new ones are substituted or added or whether they sue in different capacities. The object of the suit remains the same. The suit is upon the same contract, and only those who have a right to the fund will be able to recover it, regardless of how many persons are plaintiffs. The cause of action vested in the plaintiff by reason of the assignment is the same cause of action on which she originally sued. The contentions of defendants (technically plausible) are without merit in reality.

Defendants next contend that Boyde in fact made no assignment of the policy. It is true there was no written assignment, but the uncontradicted evidence is to the effect that Boyde gave to the administratrix the right to sue on this claim in his name. We think this amounted to an oral assignment. Cases such as Modern Brotherhood of America v. Harden, 230 S. W. 307, 17 A.L.R. 576, on which defendants rely are not at all in point since in this case the policy had in fact matured, and the right of the parties thereto fixed. A parol assignment after a loss, when the rights of the parties have thus become certain, has been held to be sufficient. Bennett v. Maryland Insurance Co., 14 Blatchford, 422. See also Mason v. Chicago Title & Trust Co., 77 Ill. App. 19; Hyatt v. Morton, 195 Ill. App. 428; Keeley v. Hargreaves, 23 Ill. 316; Morris v. Cheney, 51 Ill. 451. Such an assignment after loss seems to be valid, notwithstanding a clause in the policy prohibiting an assignment. Baves v. Chicago, B. & Q. R. R., 200 Ill. App. 380;

In Widality and Casualty Co. v. Freeman, 109 Ill. 2d 47, an administrator was on an insurance policy and the executor named in the will was substituted as plaintiff. It was held that the suit by the executor was not subject to a bar of the statute of limitations. So here, we think these defendants are not concerned with the names of plaintiffs which appear in the declaration or whether any new ones are substituted or added or whether they are in different capacities. The object of the suit remains the same. The suit is upon the same contract, and only those who have a right to the fund will be able to recover it, regardless of how many persons are plaintiffs. The cause of action vested in the plaintiff by reason of the assignment is the same cause of action on which he originally sued. The contentions of defendants (technically plaintiffs) are without merit in reality.

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O'Connor v. Maryland M. C. Ins. Co., 211 Ill. App. 549, 287 Ill. 204

It is next contended that Boyde breached the cooperation clause of the contract, which was a condition precedent to liability by wilfully and flagrantly refusing to cooperate, and that any right of action on the policy is barred for that reason. Clause A of the policy provides that "The Assured shall at all times render to the Attorney-in-Fact all co-operation and assistance in his power." Defendants asked the court to hold as a matter of law that George H. Boyde did not comply with the cooperative clause of the policy. The court refused to so hold. The court also refused to hold that cooperation with the Attorney-in-Fact was one of the conditions precedent to the validity of the policy, and that when that condition was broken the obligation of the Exchange ended. The court also refused to hold that if the condition precedent requiring cooperation by the assured were broken it was unnecessary for the insured to show prejudice resulting therefrom. This defense of non-cooperation is an affirmative one, and raised an issue of fact in which the burden was upon the defendant insurance company. The trial Judge, whomsaw and heard the witnesses, was not impressed with this defense. His finding^{on} this issue of fact in this court is entitled to the same respect and weight as the verdict of the jury. The evidence shows that Boyde, immediately after the accident, made a written report to defendants, gave the details of the accident, and that a full statement was made by him to them. The principal complaint made is that he did not keep defendants informed as to his address, which seems to have been repeatedly changed; that they were unable to reach him by registered letter at the time the cause came on for trial, and that it was tried in his absence. As a matter of fact, the evidence discloses that after the accident Boyde was convicted of an offense and spent some

O'Connor v. McLaughlin, 100 Ill. App. 2d 544, 238 Ill. 204

It is next contended that Boyle breached the cooperation clause of the contract, which was a condition precedent to liability by willfully and intentionally refusing to cooperate, and that any right of action on the policy is barred for that reason. Clause A of the policy provides that "The Assured shall at all times render to the Attorney-in-Fact all co-operation and assistance in his power." Defendants asked the court to hold as a matter of law that George A. Boyle did not comply with the cooperative clause of the policy. The court refused to so hold. The court also refused to hold that cooperation with the Attorney-in-Fact was one of the conditions precedent to the validity of the policy, and that when that condition was broken the obligation of the insurance ceased. The court also refused to hold that if the condition precedent requiring cooperation by the assured were broken it was unnecessary for the insured to show prejudice resulting therefrom. This defense of non-cooperation is an affirmative one, and raised an issue of fact in which the burden was upon the defendant insurance company. The trial judge, who saw and heard the witnesses, was not impressed with this defense. His finding of this issue of fact in this court is entitled to the same respect and weight as the verdict of the jury. The evidence shows that Boyle, immediately after the accident, made a written report to defendants, gave the details of the accident, and that a full statement was made by him to them. The principal complaint made is that he did not keep defendants informed as to his address, which seems to have been repeatedly changed; that they were unable to reach him by registered letter at the time the cause came on for trial, and that it was tried in his absence. As a matter of fact, the evidence discloses that after the accident Boyle was convicted of an offense and spent some

time in the Federal penitentiary at Leavenworth, Kansas. The court was not convinced that the investigators for defendant made the most thorough search possible or that defendants were anxious to secure the presence of Boyde at the trial. Since the plaintiff was suing as administratrix and he was the defendant he was ^{an} incompetent witness and could not have given testimony over the objection of plaintiff. The trial Judge, whose opportunity to weigh the facts was much better than ours, was of the opinion that there was no overpowering desire to have this defendant in the presence of the jury at the time the cause was tried, and that his absence was not entirely unagreeable to defendants. At any rate, shortly after the judgment was obtained the attorney for plaintiff was able to find Boyde and caused him to be taken on a capias, whereupon the defendants' attorneys appeared in his behalf and assisted in securing his release. If defendants were of the opinion that Boyde was not cooperating with them they might have withdrawn from his defense. They did not do so, and there are authorities to the effect that by such conduct any claim of lack of cooperation was waived. Daily v. Employers Liability, 269 Mass. 1; Brandon v. St. Paul Mercury, etc., 132 Kan. 68. The trial court was of this opinion, with which we are not disposed to disagree. At any rate, the question of cooperation created an issue of fact for the jury. Harrison v. U. S. Fidelity & Guar. Co., 255 Ill. App. 263. We hold that substantial justice has prevailed in this case, and the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

time in the Federal penitentiary at Leavenworth, Kansas. The court was not convinced that the investigation for which it made the most thorough search possible or that defendant was innocent to secure the presence of a jury at the trial, since the plaintiff was being an administrative and he was the defendant in the case. Defendant witnesses and could not have given testimony over the objection of plaintiff. The trial judge, whose opportunity to weigh the facts was much better than ours, was of the opinion that there was no overpowering desire to have this defendant in the presence of the jury at the time the case was tried, and that his absence was not entirely unreasonable to defendant. At any rate, shortly after the judgment was obtained the attorney for plaintiff was able to find a lawyer and caused him to be taken on a parole, whereupon the defendant's attorney appeared in his behalf and testified in support of his release. It defendant was of the opinion that he was not cooperating with them they might have withdrawn from the defense. They did not do so, and there was no intention to the effect that by such conduct any claim of lack of cooperation was waived. Willy v. Employers Liability, 303 Mass. 1; Wrentham v. W. & F. Wrentham, 132 Kan. 68. The trial court was of this opinion, with which we are not disposed to disagree. At any rate, the question of cooperation created an issue of fact for the jury. Wrentham v. W. & F. Wrentham, 132 Kan. 68. It is held that a court cannot in this case, and the judgment of the trial court is affirmed.

WILLY.

39354

J. M. ROSBERG MANUFACTURING COMPANY,
a Corporation,
Plaintiff-Appellee,

vs.

MADISON & KEDZIE STATE BANK, a
Corporation, and PAUL SCHROEDER,
Defendants-Appellants,

and

LAWRENCE A. BARRETT, a successor-
liquidating Trustee for MADISON-
KEDZIE TRUST & SAVINGS BANK,
Defendants and Cross-
Complainant, Appellee,

and

WILL H. WADE, Receiver of MADISON &
KEDZIE STATE BANK,
Defendant-Appellee.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

291 I.A. 606²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The testimony contained in this record of nearly 1500 pages may be understood best by a narration of events as the same occurred. January 10, 1930, the defendant Madison & Kedzie State Bank, herein often spoken of as the "old bank," was engaged in the banking business at 3158 West Madison street in Chicago. It was the owner of the building in which the business was conducted, and it also owned the entire capital stock of the Madison & Kedzie Safety Deposit Vault Company, which conducted a safety deposit business in the basement of the building. Defendant, Paul Schroeder, was vice-president of the bank and a director, and John T. Mammoser (originally a defendant but now deceased) was a director and its cashier.

The plaintiff corporation engaged in manufacturing wooden cabinets, conducted its business in the vicinity, was a depositor and customer who in a few years purchased about \$100,000 par value of bonds in which the bank was dealing.

January 10, 1930, plaintiff upon representations made by

J. H. ROBBING ASSOCIATING CO. INC.,
a corporation,
Plaintiff-Defendant,

vs.

KEDDIE & KEDDIE STATE BANK,
a corporation, and PAUL KEDDIE,
Defendants-Appellees,

and

LAWRENCE A. HARRIS, a successor-
liquidating trustee for KEDDIE &
KEDDIE TRUST & SAVINGS BANK,
Defendants and cross-
complainant, Appellees,

and

WILL E. WADKINS, Receiver of KEDDIE &
KEDDIE STATE BANK,
Defendant-Appellee.

THE JUSTICE MINISTRY DELIVERED THE OPINION OF THE COURT.

The facts only contained in this record of nearly 1500 pages may be understood best by a narration of events as the same occurred. January 10, 1930, the defendant Keddies & Keddies State Bank, herein often spoken of as the "old bank," was engaged in the banking business at 3158 West Madison Street in Chicago. It was the owner of the building in which the business was conducted, and it also owned the entire capital stock of the Keddies & Keddies State Bank Deposit Vant Company, which conducted a state deposit business in the basement of the building. Defendant, Paul Keddies, was vice-president of the bank and a director, and John T. Keddies (originally a defendant but now deceased) was a director and its cashier. The plaintiff corporation engaged in manufacturing wooden cabinets, conducted its business in the vicinity, was a depositor and customer who in a few years purchased about \$100,000 par value of bonds in which the bank was dealing.

January 10, 1930, plaintiff upon representations made by

RECEIVED BY THE CLERK OF THE COURT
COUNT OF COOK COUNTY.

39384

Schroeder and Mammoser that the bank was in fine condition, etc., purchased 100 shares of the capital stock of the bank for \$28,500. Plaintiff in payment gave its check for \$15,000 drawn on the old bank and payable to its order. The check was deposited and credited by the old bank to the account of the Madison & Kedzie Safety Deposit Company upon the following day, January 11, 1930. It also gave its note of \$13,500 to the old bank for the balance. The proceeds of the note were also deposited to the credit of the Safety Deposit company, and on January 11, 1930, a certificate for 100 shares of the capital stock of the old bank was issued in the name of plaintiff. The stock represented by this certificate was transferred from a certificate previously issued in the name of the safety deposit company. A part of the shares of stock thus transferred were issued formerly to Jennie Kulp, a sister of Benjamin Kulp, chairman of the board of directors of the old bank. This stock certificate was never received by plaintiff, and the records of the bank do not show what has become of it.

In the latter part of January an examiner of the Chicago Clearing House made an examination of the "old bank" for the purpose of ascertaining conditions under which a new bank organized by a syndicate might take over the old bank's liabilities. The examiner completed his examination February 6, 1930. February 8th a new bank known as the Madison-Kedzie Trust & Savings Bank entered into a contract with the old bank, under which the deposit liabilities and other named liabilities of the old bank were taken over by the new bank. At the same time and by the terms of the same contract, the new bank took over all the assets of the old bank. As a part of this transaction, directors of the old bank personally deposited \$1,000,000 with the new bank in order to save it harmless from the obligations of the old bank which it had assumed. The old bank on February 8, 1930, thereupon ceased to conduct a banking business. It has not since resumed business. Defendant Will H. Wade on

Schroeder and Mammesser that the bank was in "the condition, etc., purchased 100 shares of the capital stock of the bank for \$25,000.

Plaintiff in payment gave the bank for \$10,000 drawn on the old bank and payable to its order. The bank was required to credit by the old bank to the amount of the addition of \$10,000 drawn on the old bank upon the following day, January 11, 1930. It also gave its note of \$10,000 to the old bank for the balance. The proceeds of the note were also deposited to the credit of the old bank. Deposit company, and on January 11, 1930, a certificate for 100 shares of the capital stock of the old bank was issued in the name of plaintiff. The stock represented by this certificate was transferred from a certificate previously issued in the name of the safety deposit company. A part of the shares of stock thus transferred were issued for only to January 11, 1930, a part of which in Kulp, chairman of the board of directors of the old bank. This stock certificate was never received by plaintiff, and the records of the bank do not show that it came of it.

In the latter part of January an examiner of the Chicago Clearing House made an examination of the "old bank" for the purpose of ascertaining conditions under which a new bank organized by a syndicate might take over the old bank's liabilities. The examiner completed his examination January 6, 1930. January 11, 1930, the bank known as the Madison-Wells Trust & Savings Bank entered into a contract with the old bank, under which the deposit liabilities and other named liabilities of the old bank were taken over by the new bank. At the same time and by the terms of the said contract, the new bank took over all the assets of the old bank, as a part of this transaction, directors of the old bank personally deposited \$1,000,000 with the new bank in order to save its nameless from the obligations of the old bank which it had assumed. The old bank on February 8, 1930, thereupon ceased to conduct a banking business. It has not since resumed business. Defendant will be made on

October 28, 1931, was appointed receiver of the old bank upon petition of the State auditor.

The note of the plaintiff company was among the assets transferred to the new bank. An endorsement thereon indicates that it was thereafter negotiated through the Federal Reserve Bank in Chicago. The check for \$15,000 was deposited to the account of the Safety Vault company. The note was payable to and delivered to the old bank. The whole deal was authorized by officials of that institution. January 27, 1930, a letter from Kulp to Chicago Clearing House Association stated that the bank had \$3,000,000 in assets which were not liquid. The resolution of the board of directors passed February 8, 1930, preparatory to the transfer of the assets of the old bank to the new, stated that if these \$3,000,000 of doubtful assets were not eliminated the result would be a substantial impairment of the capital stock of the bank and probably expulsion of the "old bank" from the Chicago Clearing House Association. March 8, 1930, plaintiff filed its original bill, and April 17, 1930, its amended and supplemental bill, making defendants thereto the old and the new banks, the Safety deposit company, Mammoser, Schroeder, Wade, as receiver of the old bank, and O'Connell, as receiver, who in the meantime had been appointed to liquidate the affairs of the new bank. Plaintiff's bill alleged that the sale to it of the stock in the old bank was fraudulent and void. Its bill prayed that the contract might be rescinded, Mammoser and Schroeder held personally liable to the full extent for conspiracy and fraud; that the \$15,000 with interest be returned and the note delivered up for cancellation, defendants enjoined from transferring same, and that in the alternative, in case the note had been transferred, those guilty of the fraud be held liable for the cash value thereof with interest. The bill also prayed for

October 28, 1931, was an altered receiver of the old bank when notification of the state auditor.

The note of the Prudential company was among the assets transferred to the new bank. An agreement between indicates that it was thereafter negotiated through the Federal Reserve Bank in Chicago. The check for \$18,000 was deposited to the credit of the Prudential company. The note was payable to the order of the old bank. The whole deal was authorized by officials of that institution. January 27, 1932, a letter from Ralph to Chicago clearing house association stated that the bank had \$3,000,000 in assets which were not liquid. The resolution of the board of directors passed February 8, 1932, preliminary to the transfer of the assets of the old bank to the new, stated that if these \$3,000,000 of doubtful assets were not eliminated the result would be a substantial impairment of the capital stock of the bank and probably exclusion of the "old bank" from the Chicago clearing house association. March 8, 1932, preliminary filed its original bill, and April 17, 1932, its amended and supplemented bill, seeking damages and to set aside the old and the new banks, the Prudential company, Kammeyer, Schaefer, Wade, as receiver of the old bank, and O'Connell, as receiver, and in the meantime had been appointed to liquidate the affairs of the old bank. Prudential's bill alleged that the sale to it of the stock in the old bank was fraudulent and void. Its bill prayed that the contract might be rescinded, and Messrs. and Schaefer held personally liable to the full extent for conspiracy and fraud; that the \$18,000 with interest be returned and the note delivered up for cancellation, damages be granted for transferring same, and that in the alternative, in case the note had been transferred, those guilty of the fraud be held liable for the cash value thereof, with interest. The bill also prayed for

further relief. O'Connell, as liquidator of the new bank, filed a counterclaim based on his claim that the new bank was a holder in due course of the note for \$13,500 and demanding judgment against plaintiff for the amount due thereon with interest. An order was entered that plaintiff's amended and supplemental bill should stand as an answer to the counterclaim. Defendants answered the bill. The cause was put at issue and referred to a special commissioner, who made his report, finding that the allegations of the bill were substantially true; that the new bank took the note charged with notice by which the liquidator was bound; that the liquidator should deliver up and cancel the note for \$13,500 and that judgment for \$15,000 with interest from January 10, 1930, should be entered against the old bank and Paul A. Schroeder, Mammoser having in the meantime died. Objections to the report of the special commissioner were overruled, and these objections stood as exceptions upon the hearing before the chancellor. The chancellor overruled the exceptions of the old bank and Schroeder but sustained those of O'Connell as liquidator trustee, entered judgment on the counterclaim in favor of O'Connell and against plaintiff for the amount of the note with interest and entered judgment in favor of plaintiff and against the old bank and Schroeder for \$39,088.23. From that decree Schroeder and the "old bank" have appealed.

Defendants question the judgment entered against the plaintiff on the counterclaim, contending that the decree is erroneous in this respect, because the new bank (the Madison-Kedzie Trust and Savings Bank) was not a bona fide holder in due course of the note for \$13,500; that Schroeder being the person who obtained this note from plaintiff, also was the cashier of the old bank, also cashier of the new bank, the new bank must be held to have taken the note with full knowledge of its infirmities. Defendants point out that in

Further relief. O'Connell, as liquidator of the new bank, filed a counterclaim based on his claim that the new bank was a holder in due course of the note for \$13,500 and demanding judgment against plaintiff for the amount due thereon with interest. An order was entered that plaintiff's answer be filed and that plaintiff should stand as an answer to the counterclaim. Defendant answered the bill. The case was put at issue and referred to a special commissioner, who made his report, finding that the allegations of the bill were substantially true; that the new bank took the note armed with notice by which the liquidator was bound; that the liquidator should deliver up and cancel the note for \$13,500 and that judgment for \$13,000 with interest from January 10, 1900, should be entered against the old bank and Paul A. Schneider, manager having in the meantime died. Objections to the report of the special commissioner were overruled, and these objections stood as exceptions upon the hearing before the chancellor. The chancellor overruled the exceptions of the old bank and Schneider but sustained those of O'Connell as liquidator trustee, entered judgment on the counterclaim in favor of O'Connell and against plaintiff for the amount of the note with interest and entered judgment in favor of plaintiff and against the old bank and Schneider for \$13,000.00, from that date to Schneider and the "old bank" have appealed. Defendant's motion for judgment entered against the plaintiff on the counterclaim, contending that the decree is erroneous in this respect, because the new bank (the Madison-Nedals Trust and Savings Bank) was not a bona fide holder in due course of the note for \$13,500; that Schneider being the person who obtained this note from plaintiff, also was the owner of the old bank, also cashier of the new bank, the new bank must be held to have taken the note with full knowledge of its infirmities. Defendant points out that in

Knass v. Madison & Kedzie Bank, 269 Ill. App. 588, at page 604, this court so held. That case was afterward reversed by the Supreme court (Knass v. Madison & Kedzie Bank, 354 Ill. 564) but not because of that holding. The evidence there tended to show that the new bank took the assets of the old bank shortly after maturity and with knowledge through Gleason, vice-president and manager of the bond department of the old bank and a director of it, who also became a director of the new bank. This note was executed January 10, 1930, was due 90 days after date with interest at 6%. As a result of the court holding the new bank to be a bona fide holder of the note for value, the amount of the judgment against the old bank and Schroeder was increased by \$18,998.56. Defendants are therefore vitally affected by this provision of the decree.

If the question were open for consideration upon this record, we would hold that the finding of the master that the new bank took the note with knowledge was sustained by the evidence.

Plaintiff, who is the party most interested, does not complain that the chancellor, overruling the master, holds the new bank to be a holder in due course, and not only denies the claim of plaintiff to have the note returned, but enters judgment against plaintiff for the full amount of it. If plaintiff complained we would be inclined now, as formerly, to hold that the new bank took with notice. However, we must decide the case upon this record, not on the record of the former case. We hold upon this record defendants, themselves tortfeasors, cannot be permitted to complain. The party wronged does not object.

Kearse v. Ballou & Kellogg, 100 Ill. App. 2d, 41 page 401, this court so held. That case was affirmatively reversed by the Illinois court (Kearse v. Ballou & Kellogg, 354 Ill. 2d, 41 and 42) of that holding. The evidence in that case is not that the new bank took the assets of the old bank absolutely without maturity and without knowledge through its officers, vice-presidents and members of the board of directors of the old bank and a director of it, who also became a director of the new bank. This note was executed January 10, 1937, was due 90 days after date with interest at 6%. As a result of the court holding the new bank to be a party to the note on the date for value, the amount of the judgment against the old bank was correspondingly increased by \$18,975.00. Defendants are therefore vitally affected by this provision of the statute.

If the question were open for consideration upon this record, we would only say that the holding of the court that the new bank took the note with knowledge was sustained by the evidence.

Plaintiff, who is the party most interested, does not complain that the chancellor, overruling the answer, found the new bank to be a holder in due course, and not only taking the claim of plaintiff to have the note returned, but enters judgment against plaintiff for the full amount of it. If plaintiff complains we would be inclined now, as formerly, to hold that the new bank took with notice. However, we must decide the case upon this record, not on the record of the former case. We hold upon this record that defendants, themselves tortfeasors, cannot be permitted to complain. The party wronged does not object.

The bill of plaintiff alleged that the new bank took this note with full knowledge of the equities. Defendants by their answer expressly denied this averment, and their answer contained no allegation under which they can now contend to the contrary. The bill of complaint gave fair notice in this respect and prayed relief in the alternative that if for any reason the court should hold that the note was not to be cancelled, plaintiff might have judgment against defendants for the full amount of the note with interest. Moreover, when the master reported finding that the new bank was not a holder in due course the defendants filed specific objections to that finding. The objections were overruled by the master but sustained as exceptions by the chancellor. Having thus persuaded the court to hold ^{with} them, defendants are not now in a position to ask this court to reverse the trial court on account of the very holding defendants persuaded the court to make. Sheridan v. City of Chicago, 175 Ill. 421; People v. Clements, 316 Ill. 282; Davis v. Illinois Collieries Company, 232 Ill. 284.

Again this argument of defendants is based upon the assumption that they themselves are guilty of fraud as charged in the bill. They now ask that knowledge of their own fraud may be imputed to the new bank to relieve them from liability incurred by reason of their fraud. Defendants cannot be permitted to take advantage of their own wrongdoing. Golden v. Cervenka, 278 Ill. 409; Niblack v. Farley, 286 Ill. 536; Ruvenacht v. German American Bank, 212 Ill. App. 68.

The decree in this case entered judgment against Will H. Wade, receiver of the Madison and Kedzie State Bank. Wade was appointed receiver of the old bank October 28, 1931. He had nothing whatever to do with the transaction of which plaintiff complains. In Knass v. Madison and Kedzie Bank we said it was technically erroneous to enter a judgment against him and modified the decree by

The bill of plaintiff alleged that the new bank took this

note with full knowledge of the equities. Defendants by their

answer expressly denied this allegation, and their answer contained

no allegation upon which they can now contend to the contrary. The

bill of complaint gave full notice in this respect and prayed relief

in the alternative that if for any reason the court should hold that

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against defendants for the full amount of the note with interest.

Moreover, when the answer requested finding that the new bank was not

a holder in due course the defendants filed specific objections to

that finding. The objections were overruled by the court but was

tained as exceptions by the Chancellor. Having thus preserved the

court to hold that defendants are not now in a position to ask this

court to reverse the trial court on account of the very holding de-

endants requested the court to make. Whitman v. City of Chicago,

175 Ill. 431; People v. Clements, 216 Ill. 282; Davis v. Illinois

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vantage of their own wrongdoings. Graham v. Gervais, 238 Ill. 409;

Kilgus v. Taylor, 232 Ill. 633; Hubbard v. German American Bank,

212 Ill. App. 88.

The decree in this case entered judgment against Will &

Wade, receiver of the Madison and Lake State Bank. He was ap-

pointed receiver of the said bank October 23, 1911. He had nothing

whatever to do with the transaction of which plaintiff complains.

In Kraus v. Madison and Lake State Bank we said it was technically in-

competent to enter a judgment against him and modified the decree by

striking out the words "Will H. Wade, receiver." Notices of this appeal were served upon Will H. Wade, receiver, as on other parties to the record. He has not appeared or made any objection to the judgment. His appointment, of course, did not end the corporation of which he was made receiver. It continued as a legal entity. Dillon v. Elmore, 361 Ill. 356; U. S. v. Weitzel, 246 U. S. 533. If, however, it be conceded that the judgment as to him was erroneous, these defendants have no standing to urge that error in this court. Carter v. Rodwald, 108 Ill. 351.

Defendants argue that trading in its own stock was ultra vires the powers of the old bank and contrary to public policy, and that plaintiff may not recover for that reason. They cite authorities such as Knass v. Madison and Kedzie State Bank, 354 Ill. 554; People v. Wiersema State Bank, 361 Ill. 75; People ex rel. Edward J. Barrett, Auditor, v. First State Bank & Trust Company of Canton, 364 Ill. 294; and People v. Citizens Bank of Durand, 275 Ill. App. 159. The argument of defendants appears to be that in making an agreement to purchase capital stock of the old bank from the old bank plaintiff was charged with notice of the law limiting the powers of the bank in this respect. We think the contention is without merit. Assuming the transaction in its own capital stock was ultra vires, cases such as the Knass and other cases cited would not be applicable. In the Knass case the plaintiff sued on a contract made with the bank and for the purpose of securing a specific performance of it. Here the plaintiff rescinds the contract and sues to recover because of fraud damages amounting to the consideration which it is alleged was obtained from it by fraudulent representations. We do not understand that it is against the public policy of the State to permit the rescission of an ultra vires contract made by a corporation, banking or otherwise. On the contrary public policy under ordinary circumstances favors such a rescission. There is no

striking out the words "Will H. Wade, receiver." Notice of this appeal were served upon Will H. Wade, receiver, as on other parties to the record. He has not appeared or made any objection to the judgment. His appointment, of course, did not end the corporation of which he was made receiver. It continued as a legal entity. Will H. Wade, receiver, 361 Ill. 388; 3 U.S. 558. It, however, it be conceded that the judgment as to him was erroneous, these defendants have no standing to urge that error in this court. Garter v. Howland, 108 Ill. 311.

Defendants argue that trading in its own stock was ultra vires the powers of the old bank and contrary to public policy, and that plaintiff may not recover for that reason. They cite authorities such as People v. Wisconsin State Bank, 361 Ill. 75; People v. First National Bank, 364 Ill. 384; J. Barrett, receiver, v. First State Bank & Trust Company of Chicago, 364 Ill. 384; and People v. Citizens Bank of Chicago, 365 Ill. 384. App. 189. The argument of defendants appears to be that in making an agreement to purchase capital stock of the old bank from the old bank plaintiff was charged with notice of the law limiting the powers of the bank in this respect. We think the contention is without merit. Assuming the transaction in its own capital stock was ultra vires, cases such as the above and other cases cited would not be applicable. In the above case the plaintiff sued on a contract made with the bank and for the purpose of securing a specific performance of it. Here the plaintiff rescinds the contract and asks to recover because of fraud charges amounting to the consideration which it is alleged was obtained from it by fraudulent representations. We do not understand that it is against the public policy of the state to permit the rescission of an ultra vires contract made by a corporation, banking or otherwise. On the contrary public policy under ordinary circumstances favors such a rescission. There is no

question in this case of protecting the assets of the bank for the benefit of depositors such as the Supreme court found to exist in the Knass case. That and similar cases are, therefore, clearly distinguishable. The supposed reason there present is entirely absent here.

Moreover, while the purchase of its own stock by a bank and trading therein may be ultra vires the banking corporations, we know of no case which holds that it is ultra vires a bank, organized in Illinois, to sell its own stock. The authorities seem to agree that a banking corporation may lawfully sell its own capital stock, and that it is immaterial whether in such a transaction it acts for itself or on behalf of an undisclosed principal. The authorities seem further to hold that this is true even though the stock may have been unlawfully acquired by the bank, and that a purchaser of its capital stock from the bank is not put on notice that the bank may have acquired the same unlawfully. We think defendants have misinterpreted and misapplied the law of ultra vires. Zollman, Banks & Banking, vol. 1, sec. 346, page 287 and vol. 1, sec. 266, p. 244; Oppenheimer v. Harriman Nat'l Bank & Trust Co., 85 Fed. (2d) 582; Salter v. Williams, 244 Fed. 126; Zollman, Banks & Banking, vol. 1, sec. 251, p. 224; Lantry v. Wallace, 97 Fed. 365. Moreover, there is abundant authority to the effect that a bank holding such stock which by misrepresentation or fraud sells the same is liable for its tort upon rescission of the contract of sale, and that the doctrine of ultra vires is no defense to its own wrongdoing. Oppenheimer v. Harriman National Bank & Trust Co., 85 Fed. (2d) 582; National Bank and Loan Co. v. Petrie, 189 U. S. 423; Zollman, Banks & Banking, (Perm. Ed), vol. 1, sec. 346, p. 237, and vol. 1, sec. 266, p. 244; National Bank v. Graham, 100 U. S. 699, 25 L. E. 750; Pronger v. Old Nat'l Bank, 56 Pac. 391, 20 Wash. 618; Ryan v. Mt. Vernon Nat'l Bank, 206 Fed. 452, 124 C. C. A. 358.

question in this case of protecting the assets of the bank for the benefit of depositors also in the Supreme Court found to exist in the mass case. That and similar cases are, therefore, clearly distinguishable. The supposed reason there present is entirely absent here.

Moreover, while the purchase of its own stock by a bank and trading therein may be ultra vires for banking corporations, we know of no case which holds that it is ultra vires a bank, organized in Illinois, to sell its own stock. The authorities seem to agree that a banking corporation may lawfully sell its own capital stock and that it is immaterial whether in such a transaction it acts for itself or on behalf of an unincorporated principal. The authorities seem further to hold that this is true even when the stock may have been and vitally acquired by the bank, and that a purchaser of its capital stock from the bank is not put on notice that the bank may have acquired the same unlawfully. We think defendants have misinterpreted and misapplied the law of ultra vires. Colman, Banks & Banking, vol. 1, sec. 346, page 237 and vol. 1, sec. 350, p. 244; Overman v. Harrison National Bank & Trust Co., 23 Ill. (2d) 532; Walter v. Williams, 244 Ill. 123; Colman, Banks & Banking, vol. 1, sec. 351, p. 234; Walter v. Williams, 27 Ill. 325. Moreover, there is abundant authority to the effect that a bank holding such stock which by misrepresentation or fraud sells the same is liable for its tort upon rescission of the contract of sale, and that the doctrine of ultra vires is no defense to its own wrongdoing. Overman v. Harrison National Bank & Trust Co., 23 Ill. (2d) 532; National Bank and Loan Co. v. Petrie, 139 U. S. 423; Colman, Banks & Banking, (Perm. Ed.), vol. 1, sec. 346, p. 237, and vol. 1, sec. 350, p. 244; National Bank v. Overman, 100 U. S. 599, 25 L. E. 750; Proctor v. City Nat'l Bank, 88 Ill. 391, 23 Ill. 318; Walter v. Williams, 244 Ill. 123, 124 U. S. 423.

We are aware that it has been held that the rights of a plaintiff thus defrauded may become subordinate to the rights of general creditors upon the insolvency of the bank unless rescission is made prior to the insolvency, but as plaintiff suggests that issue is not before this court at this time, and it seems ironical that a bank which, through its officers, has been guilty of fraudulent practices, should, when brought to the bar of justice, plead for its general creditors. Moreover, the record here does not show any deposit creditors. On the contrary it appears that all the deposit liabilities of the old bank were assumed by the new bank. Arguments of defendants based on the theory that the transaction was ultra vires the bank are without merit. In these we also include the contention of defendants that the evidence does not show that Mammoser and Schroeder acted as agents of the bank in the transaction by which its stock was sold to plaintiff. The bank itself was of course an invisible, intangible legal entity. It could act only through its officers and agents. Schroeder at this time was its cashier. Mammoser was its vice president and executive officer. Plaintiff was a customer of years in many transactions and defendants ^{knew its} relationship to the bank as an institution. Defendants suggest that the stock transferred was from a certificate of the safety deposit company and urge that presumably, therefore, the transaction was with that concern. The transaction was closed at the office of the bank. The solicitation took place at the office of the plaintiff, but the evidence shows that it was not unusual for officers of the bank to contact its customers at their place of business. The note here was made payable to the order of the old bank. The check was also payable to its order. There is no evidence tending to show that plaintiff knew that the bank was about to take the stock to be transferred to it from a certificate standing in the name of the deposit company. It does not appear that the name

We are aware that it has been held that the nature of a plaintiff's claim determines the remedy to which he is entitled. General creditors upon the insolvency of the bank and its resolution is made prior to the insolvency, but as plaintiff's claim is made is not before this court as this time, and it seems incorrect that a bank which, through its officers, has been guilty of fraudulent practices, should, when brought in the line of justice, stand for its general creditors. Moreover, the record here does not show any deposit creditors, as the country is sparsely settled and the deposit liabilities of the bank were assumed to be small. Arguments of defendant are to the effect that the transaction was void ab initio and without merit. It is also in-
clude the contention of defendant that the evidence does not show that the bank was considered as agents of the bank in the transaction by which its assets were sold to plaintiff. The bank itself was of course an invisible, intangible legal entity. It could not only through its officers and agents. Defendant at this time was its cashier. Defendant was the vice president and executive officer. Plaintiff was a customer of the bank in many transactions and defendant's relationship to the bank as an institution. Defendant
and suggest that the stock transferred was from a certificate of the safety deposit company and not from defendant. Therefore, the transaction was with that company. The transaction was closed at the office of the bank. The solicitation took place at the office of the plaintiff, but the evidence shows that it was not unusual for officers of the bank to contact its customers at their place of business. The note was made payable to the order of the plaintiff bank. The check was also payable to its order. There is no evidence tending to show that plaintiff knew that the bank was to take the stock to be transferred to it from a certificate standing in the name of the deposit company. It does not appear that the name

of the deposit company was ever mentioned throughout the transaction. The old bank owned all the stock of the deposit company and used and controlled it. We think there is evidence from which it could reasonably be found that the safety deposit company was used by the old bank for that purpose. Every circumstance in this case tends to show that Mammoser and Schroeder were acting for and as agents of the old bank and had authority to so act. Schroeder's own evidence is to this effect. The finding of the decree that in making the representations Schroeder and Mammoser acted for the old bank is abundantly sustained by the evidence. We think this court cannot say that the finding is against the evidence.

Again the defendants contend that plaintiff cannot recover for the reason that defendants are not now possessed of the consideration. They say plaintiff had its election either to sue in tort or to bring its actions upon an implied agreement to repay what was unlawfully obtained from it; that plaintiff elected to sue on the implied agreement rather than for the tort, and having elected to waive the tort and rely upon the implied promise it can maintain its action only against such of the defendants as are shown to have actually received and now retain the consideration given by plaintiff. In other words, defendants contend that plaintiff is limited to a recovery against such defendants as may have been unjustly enriched by the fraudulent transaction. Defendants cite Arnold v. Dodson, 272 Ill. 377; Howard v. Swift, 356 Ill. 80, with similar cases. These cases announce the general rule of law that a plaintiff having his election to sue either in tort or assumpsit by bringing an action in one form waives his right to maintain an action in the other form. In Howard v. Swift the jurisdiction of the Probate court was invoked to recover against the estate of a director of a corporation where the claim was necessarily in tort, there being no showing that the director was enriched by his alleged wrongful acts. The claim

of the deposit company was ever mentioned throughout the transaction. The old bank owned all the stock of the deposit company and used and controlled it. We said there is evidence from which it could reasonably be found that the safety deposit company was used by the old bank for that purpose. Every circumstance in this case tends to show that Mammoser and Schreiber were acting for and as agents of the old bank and had authority to so act. Schreiber's own evidence is to this effect. The finding of the decree that in making the representations Schreiber and Mammoser acted for the old bank is abundantly sustained by the evidence. We think this court cannot say that the finding is against the evidence.

Again the defendants contend that plaintiff cannot recover for the reason that defendants are not now possessors of the consideration. They say plaintiff had its election before to sue in tort or to bring its action upon an implied agreement to repay what was unlawfully obtained from it; that plaintiff elected to sue on the implied agreement rather than on the tort, and having elected to waive the tort and rely upon the implied promise it can maintain its action only against such of the defendants as are shown to have actually received and now ret in the consideration given by plaintiff. In other words, defendants contend that plaintiff is limited to a recovery against such defendants as may have been unjustly enriched by the fraudulent transaction. Defendants cite Arnold v. Johnson, 272 Ill. 377; Morgan v. Swift, 356 Ill. 80, with similar cases. These cases announce the general rule of law that a plaintiff having his election to sue either in tort or assumpsit by bringing an action in one form waives his right to maintain an action in the other form. In Morgan v. Swift the jurisdiction of the probate court was invoked to recover against the estate of a director of a corporation where the claim was necessarily in tort, there being no showing that the director was enriched by his alleged wrongful acts. The claim

was filed by the trustee in bankruptcy of the estate of the deceased director. The court, denying the right of the trustee to maintain its suit in the Probate court, pointed out that the Probate court was without general equitable jurisdiction.

This suit is in equity. The bill prays for general relief. It charges a conspiracy on the part of defendants. Essentially the action is not in assumpsit but in tort. Such a suit is clearly distinguishable from cases such as National Shawmut Bank of Boston v. Citizens National Bank of Boston, 287 Mass. 329, 191 N. E. 647, upon which defendants rely, but which was in fact an action at law. These cases have no application to an action of this character.

Defendants in their reply brief say that they rely upon the theory that the findings of the decree are against the manifest weight of the evidence. A perusal of their briefs indicates that they can hardly be said to deny that the representations alleged as to the financial condition of the bank were made, but they argue with some degree of boldness, as it seems to us, that these representations were not proved to be in fact false, and moreover, that plaintiff did not rely upon them. The evidence shows that plaintiff, except as it received information from the representatives of the bank, was without knowledge as to the actual financial condition of the corporation in which it was persuaded to invest its money. The officers and agents of plaintiff made no independent investigation. They had known these officers and agents of the bank for many years. The fair inference is that they relied upon what these representatives of the bank said to them. Otherwise it would be necessary to presume that they invested this considerable amount of money without knowing anything about what they were doing. The master made no finding as to whether the bank was in good and sound financial condition at the time these representations were made because, as the report states, of the lack of sufficient, competent evidence on the value of the

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This suit is in equity. The bill prays for general relief. It charges a conspiracy on the part of defendants. Apparently the action is not an assumpsit but is tort. Such a suit is clearly distinguishable from cases such as National Bank of Boston v. Citizens National Bank of Boston, 257 Mass. 319, 111 N. E. 2d, 1009, which defendants rely, but which was in fact an action at law. These cases have no application to an action of this character.

Defendants in their reply brief say that they rely upon the theory that the findings of the referee are against the undisputed weight of the evidence. A general statement of their brief indicates that they can hardly be said to deny that the representations alleged as to the financial condition of the bank were made, but they argue with some degree of boldness, as it seems to us, that these representations were not proved to be in fact false, and moreover, that plaintiff did not rely upon them. The evidence shows that plaintiff except as it received information from the representatives of the bank, was without knowledge as to the actual financial condition of the corporation in which it was persuaded to invest its money. The officers and agents of plaintiff made no independent investigation. They had known these officers and agents of the bank for many years. The fair inference is that they relied upon what these representatives of the bank said to them. Otherwise it would be necessary to presume that they invested this considerable amount of money without knowing anything about what they were doing. The master made no finding as to whether the bank was in fact in sound financial condition at the time these representations were made because, as the report states, of the lack of sufficient competent evidence on the value of the

assets of the bank. The master found, however, "that from a functioning viewpoint" the bank at the time of the representations was not in a good or sound condition, and that Schroeder as cashier was apprised of its major earnings and losses and its general business condition. The chancellor, in part overruling the master, found as a fact that the bank was not in good or sound financial condition on January 6, 1930, or January 10, 1930, when these representations were made. We are disposed to hold that the finding of the chancellor in this respect is sustained by the record. The master excluded the testimony of Evar G. Swanson, an expert examiner of 11 years experience for the Chicago Clearing House, who had made 1000 bank examinations, ^{and} was employed by the bank to make an examination of its assets. The contract of February 8, 1930, between the old and the new banks was based upon Swanson's examination. He was afterward put in charge of the liquidation of the assets of the old bank, and he liquidated assets aggregating \$6,000,000. He testified at length as to the value of these assets; that he made a complete written report as to all the assets of the bank, and that he left this report in the bank on March 1, 1932, when his employment ceased. This report was demanded by plaintiff but was not produced. Thereupon the witness testified as to the values, giving his best recollection. Defendants acted on his report and on his opinions. His report was a part of the bank's files and records. Its non-production made secondary evidence admissible. We think the master erred in striking this evidence under such circumstances.

An official statement by the officer of the bank shows that it had \$3,000,000 bad or doubtful assets which was more than its combined capital, surplus and undivided profits. Such a bank can not be said to be in good condition. The evidence also tends to show that from 1923 to 1929 the dividends paid by the old bank exceeded its earnings by \$724,999. In view of all the facts disclosed by

assets of the bank. The master found, however, "that from a financial viewpoint" the bank at the time of the liquidation was not in a good or sound condition, and that therefore as a matter was appraised of its major earnings and losses and its general business condition. The chancellor, in part overruling the master, found as a fact that the bank was not in good or sound financial condition on January 6, 1930, or January 10, 1930, when those representations were made. We are disposed to hold that the finding of the chancellor in this respect is sustained by the record. The master excluded the testimony of Mr. G. Hanson, an expert examiner of 11 years experience for the Chicago Clearing House, who had made 1000 bank examinations and was employed by the bank to make an examination of its assets. The contract of January 3, 1930, between the old and the new banks was based upon Hanson's examination. He was afterwards put in charge of the liquidation of the assets of the old bank, and he liquidated assets representing \$5,000,000. He testified at length as to the value of these assets; that he made a complete written report as to all the assets of the bank, and that he left this report in the bank on March 1, 1932, when his employment ceased. This report was demanded by plaintiff but was not produced. Thereupon the witness testified as to the values, giving his best recollection. Defendants acted on his report and on his opinion. His report was a part of the bank's files and records. Its non-production made secondary evidence admissible. We think the master erred in striking this evidence under such circumstances.

An official statement by the officer of the bank shows that it had \$3,000,000 paid or doubtful assets which were more than its combined capital, surplus and undivided profits. Such a bank can not be said to be in good condition. The evidence also tends to show that from 1923 to 1929 the dividends paid by the old bank exceeded the earnings by \$724,999. In view of all the facts disclosed by

this record to believe that the bank was in the condition as represented at the time of this transaction with plaintiff would require a degree of credulity which this court does not possess. Under the law it was not necessary in order to hold defendants liable to prove scienter on their part. Tone v. Halsey, Stuart and Co., 286 Ill. App. 169; Nat'l Bank of Pawnee v. Hamilton, 202 Ill. App. 516, and Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665. If, however, it were necessary to prove scienter and if the chancellor had so found, we would not on this record be able to hold the findings to be against the weight of the evidence. Pasedach v. Auz, 364 Ill. 491.

The decree of the Superior court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

Under the law it was not necessary in order to hold defendants liable to prove scienter on their part. Id. 100. Id. 101. Id. 102. Id. 103. Id. 104. Id. 105. Id. 106. Id. 107. Id. 108. Id. 109. Id. 110. Id. 111. Id. 112. Id. 113. Id. 114. Id. 115. Id. 116. Id. 117. Id. 118. Id. 119. Id. 120. Id. 121. Id. 122. Id. 123. Id. 124. Id. 125. Id. 126. Id. 127. Id. 128. Id. 129. Id. 130. Id. 131. Id. 132. Id. 133. Id. 134. Id. 135. Id. 136. Id. 137. Id. 138. Id. 139. Id. 140. Id. 141. Id. 142. Id. 143. Id. 144. Id. 145. Id. 146. Id. 147. Id. 148. Id. 149. Id. 150. Id. 151. Id. 152. Id. 153. Id. 154. Id. 155. Id. 156. Id. 157. Id. 158. Id. 159. Id. 160. Id. 161. Id. 162. Id. 163. Id. 164. Id. 165. Id. 166. Id. 167. Id. 168. Id. 169. Id. 170. Id. 171. Id. 172. Id. 173. Id. 174. Id. 175. Id. 176. Id. 177. Id. 178. Id. 179. Id. 180. Id. 181. Id. 182. Id. 183. Id. 184. Id. 185. Id. 186. Id. 187. Id. 188. Id. 189. Id. 190. Id. 191. Id. 192. Id. 193. Id. 194. Id. 195. Id. 196. Id. 197. Id. 198. Id. 199. Id. 200. Id. 201. Id. 202. Id. 203. Id. 204. Id. 205. Id. 206. Id. 207. Id. 208. Id. 209. Id. 210. Id. 211. Id. 212. Id. 213. Id. 214. Id. 215. Id. 216. Id. 217. Id. 218. Id. 219. Id. 220. Id. 221. Id. 222. Id. 223. Id. 224. Id. 225. Id. 226. Id. 227. Id. 228. Id. 229. Id. 230. Id. 231. Id. 232. Id. 233. Id. 234. Id. 235. Id. 236. Id. 237. Id. 238. Id. 239. Id. 240. Id. 241. Id. 242. Id. 243. Id. 244. Id. 245. Id. 246. Id. 247. Id. 248. Id. 249. Id. 250. Id. 251. Id. 252. Id. 253. Id. 254. Id. 255. Id. 256. Id. 257. Id. 258. Id. 259. Id. 260. Id. 261. Id. 262. Id. 263. Id. 264. Id. 265. Id. 266. Id. 267. Id. 268. Id. 269. Id. 270. Id. 271. Id. 272. Id. 273. Id. 274. Id. 275. Id. 276. Id. 277. Id. 278. Id. 279. Id. 280. Id. 281. Id. 282. Id. 283. Id. 284. Id. 285. Id. 286. Id. 287. Id. 288. Id. 289. Id. 290. Id. 291. Id. 292. Id. 293. Id. 294. Id. 295. Id. 296. Id. 297. Id. 298. Id. 299. Id. 300. Id. 301. Id. 302. Id. 303. Id. 304. Id. 305. Id. 306. Id. 307. Id. 308. Id. 309. Id. 310. Id. 311. Id. 312. Id. 313. Id. 314. Id. 315. Id. 316. Id. 317. Id. 318. Id. 319. Id. 320. Id. 321. Id. 322. Id. 323. Id. 324. Id. 325. Id. 326. Id. 327. Id. 328. Id. 329. Id. 330. Id. 331. Id. 332. Id. 333. Id. 334. Id. 335. Id. 336. Id. 337. Id. 338. Id. 339. Id. 340. Id. 341. Id. 342. Id. 343. Id. 344. Id. 345. Id. 346. Id. 347. Id. 348. Id. 349. Id. 350. Id. 351. Id. 352. Id. 353. Id. 354. Id. 355. Id. 356. Id. 357. Id. 358. Id. 359. Id. 360. Id. 361. Id. 362. Id. 363. Id. 364. Id. 365. Id. 366. Id. 367. Id. 368. Id. 369. Id. 370. Id. 371. Id. 372. Id. 373. Id. 374. Id. 375. Id. 376. Id. 377. Id. 378. Id. 379. Id. 380. Id. 381. Id. 382. Id. 383. Id. 384. Id. 385. Id. 386. Id. 387. Id. 388. Id. 389. Id. 390. Id. 391. Id. 392. Id. 393. Id. 394. Id. 395. Id. 396. Id. 397. Id. 398. Id. 399. Id. 400. Id. 401. Id. 402. Id. 403. Id. 404. Id. 405. Id. 406. Id. 407. Id. 408. Id. 409. Id. 410. Id. 411. Id. 412. Id. 413. Id. 414. Id. 415. Id. 416. Id. 417. Id. 418. Id. 419. Id. 420. Id. 421. Id. 422. Id. 423. Id. 424. Id. 425. Id. 426. Id. 427. Id. 428. Id. 429. Id. 430. Id. 431. Id. 432. Id. 433. Id. 434. Id. 435. Id. 436. Id. 437. Id. 438. Id.</

5. Written at 10:00 AM on 10/10/10

1911

O'Donnell, J. L., and G. L. ...

39468

NATHAN K. MCGILL,
Appellant,

vs.

H. J. COLEMAN & CO. AGENCY AND
LOAN CORPORATION et al.,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

291 I.A. 606³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff brought suit for the alleged conversion by defendants of a judgment note executed to his order by John G. Tyree, for \$615. There was a trial by the court and a finding of not guilty as to Hacking Brothers Audit Company. As to H. J. Coleman and Company the court made a finding against it and assessed damages at the sum of \$50 and entered judgment upon both these findings. The court, however, in entering its finding against H. J. Coleman and Company said that the \$50 allowed was "for reasonable attorney's fees and not a judgment for the loss or destruction of the note while in the hands of defendant H. J. Coleman & Co., Inc." The plaintiff has appealed and contends that the judgment should be reversed with a finding of conversion and judgment for damages to the amount of the face of the note with interest.

The evidence tends to show that defendant H. J. Coleman & Co. became manager of real estate properties for plaintiff about March 1, 1933. At that time Roy D. Haverstick, now employed by another concern, was in charge of defendant H. J. Coleman's affairs. Plaintiff McGill (a lawyer as well as owner of certain real estate) made a contract with the Coleman company to manage some of his properties and collect the rents. He dealt with Haverstick, who was then in charge of the H. J. Coleman office, and at the request of Haverstick gave to him a statement as to

ATTEST:
 J. J. COLLIER, JR.,
 Notary Public for the State of New York.
 My Commission Expires on _____
 1933.

MR. JUSTICE MATHIAS DELIVERED THE VERDICT OF THE COURT.

The plaintiff brought suit for the alleged conversion by defendant of a judgment note assigned to him under by term of the judgment. There was a trial by the court and a finding of not guilty as to having converted said note. As to the value of the note, the court made a finding of \$100,000.00. Defendant and company entered judgment upon both these findings. The court, however, in reversing its finding against defendant, said that the \$100,000.00 allowed was "for reasonable attorney's fees and not a judgment for the loss or destruction of the note which in the hands of defendant is a judgment for damages to the amount of the face of the note with interest."

The evidence tends to show that defendant J. J. Collman, Jr. became manager of real estate properties for plaintiff about March 1, 1933. At that time Roy D. Haverstick, now employed by another concern, was in charge of defendant J. J. Collman's affairs. Plaintiff Collman (a lawyer as well as owner of certain real estate) made a contract with the Collman company to manage some of his properties and collect the rents. He dealt with Haverstick, who was then in charge of the J. J. Collman office, and at the request of Haverstick gave to him a statement as to

the standings of his respective tenants with reference to the payment of rent. In this connection plaintiff informed Haverstick that Tyree, who was one of his tenants, had executed this judgment note on account of rents due from him. At the suggestion of Haverstick McGill delivered this note to him and received the receipt of the H. J. Coleman Company for it. McGill's testimony is to the effect that he never saw the note again; never received any payments on it and demanded its return from Coleman & Co. without avail. Haverstick's testimony was to the effect that he told McGill at the time the note was delivered to H. J. Coleman & Co. that it would be sent to Hacking Bros. Audit Co. for collection. He further testified that he sent the note by mail to that agency. McGill denies that there was any such conversation and denies there was any agreement that the note should be collected by any agency other than that of H. J. Coleman & Co. John G. Tyree, the maker of the note, testified that it was given to McGill for rent past due; that he had received a five day notice, was going to be put out of the premises and was told that if he signed the note he would "not be put out in the street." Tyree also says that McGill told him afterward "to forget the note," and McGill does not deny that he made this statement. Tyree also testified that he owes the full amount of the note, and that a collection agency (which one he does not say) made an inquiry of him concerning the note about three weeks after he signed it. The trial Judge suggested that if plaintiff wished to make Tyree defendant, judgment could be obtained against him for the full amount of the note, but this suggestion brought no response from plaintiff. The appeal is by the plaintiff and is not joined in by either of the other defendants. Plaintiff's complaint is that there should be a finding that H. J. Coleman & Co. converted the note to its own use, and

the statements of his representative tenants with reference to the payment of rent. In this connection plaintiff introduced a letter that Tyree, who was one of the tenants, had received from the note on account of rent due from him. At the expiration of thirty days after delivery of this note to him, he received the receipt of the A. J. Coleman Company for it. Plaintiff's statement is to the effect that he never saw the note again; never received any payments on it and demanded its return from Coleman & Co. without avail. Plaintiff's testimony was to the effect that he told McGill at the time the note was delivered to A. J. Coleman & Co. that it would be sent to Mackay Bros. Adair Co. for collection. He further testified that he sent the note by mail to that agency. McGill denied that there was any such conversation and advised there was any person that the note should be collected by any agency other than that of A. J. Coleman & Co. John H. Tyree, the manager of the note, testified that it was given to McGill for rent payment; that he had received a five day notice, was going to be put out of the premises and was told that if he signed the note he would "not be put out in the street." Tyree also testified that McGill told him "never" to "touch" the note, and McGill does not deny that he made this statement. Tyree also testified that he owes the full amount of the note, and that a collection agency (which one he does not say) made an inquiry of him concerning the note about three weeks after he signed it. The trial judge suggested that if plaintiff failed to show Tyree had signed, judgment could be obtained against him for the full amount of the note, but this suggestion produced no response from plaintiff. The record is by the plaintiff and is not joined in by either of the other defendants. Plaintiff's contention is that there should be a finding that A. J. Coleman & Co. converted the note to its own use, and

that he should have judgment for the face value of it with interest.

If we assume there should have been a finding that the note was converted, the value of the note prima facie was the face amount of it with interest. American Express Co. v. Parson, 44 Ill. 312-316; Hayes v. Mass. Mut. Life Ins. Co., 125 Ill. 626-637, 18 N. E. 322-326; Babcock v. Harrison, 310 Ill. 413-419, 141 N.E. 701-704; Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 139; 72 N.E. Ill. 202. However, even if the evidence justified a finding that defendants converted the note, judgment could not be rendered for the amount asked because the evidence in the record shows that the note was not worth its face value. On the contrary the evidence shows that at the time the note was given the maker was unable to pay his rent, had received a five day notice and was about to be put into the street. The evidence also shows that McGill told the maker of the note to forget about ^{it} and declined to accept the suggestion of the trial Judge that he take a judgment on it against the maker, who had testified under oath that he had paid nothing whatever upon it. We think the evidence justifies an inference that the note was not worth its face value, but on the contrary was worthless. Moreover, the trial court specifically found that there was no conversion, and we think this finding was justified. The authorities are to the effect that in order to constitute a conversion there must be some positive and tortious act, although not willful or corrupt. Neither negligence, active or passive, nor breach of contract, even though it resulted in the loss of specific property, constitute the wrong of conversion. Burge v. Englewood Motor Car & Garage Co., 213 Ill. App. 357; Emmert v. United Bank & Trust Co. of California, et al., 57 Pac. (2d) 963. We are aware that a conversion may consist of a refusal to surrender a chattel on demand. Restatement, Torts., sec. 223 g. This is the only theory upon which the defendants could be held guilty of conversion

that he should have judgment for the time value of it with interest.

It we assume there should have been a finding that the note was converted, the value of the note given by the defendant would be converted, the value of it with interest. American Express Co. v. Pearson, 14 Ill. 312-316; Hayes v. Hayes, Int. Life Ins. Co., 128 Ill. 600-607, 18 N.E. 322-326; Jackson v. Harrison, 71 Ill. 413-419, 11 Ill. 401-404; Mutual Life Ins. Co. v. Allen, 211 Ill. 134, 138; 71 N.E. 111. 302. However, even if the evidence justified a finding that defendants converted the note, that fact could not be rendered for the amount asked because the evidence in the record shows that the note was not worth its face value. On the contrary the evidence shows that at the time the note was given the market was unable to pay his rent, had received a five day notice and was about to be put into the street. The evidence also shows that he fell into the gutter of the street. The evidence also showed that he lost the maker of the note to forget about it and seemed to receive no suggestion of the trial judge that he take a judgment on it against the maker, who had testified under oath that he had paid nothing whatever upon it. We think the evidence justified on that point that the note was not worth its face value, but on the contrary was worthless. However, the trial court specifically found that there was no conversion, and we think this finding was justified. The authorities are to the effect that in order to constitute a conversion there must be some positive and forcible act, although not willful or corrupt. Neither negligence, active or passive, nor breach of contract, even though it resulted in the loss of specific property, constitutes wrong of conversion. Hart v. Hartford, Motor Car & Garage Co., 213 Ill. App. 387; Hart v. United Bank, 213 Ill. App. 387; Trust Co. of California, et al., 57 Cal. (2d) 262. We are aware that a conversation may consist of a refusal to surrender a chattel on demand. Restatement, Torts, sec. 223. This is the only theory upon which the defendants could be held liable of conversion.

under the evidence in this record. It is clear, however, that the court did not believe the testimony of plaintiff to the effect that the note in question was sent to the collection agency without his knowledge, or consent. Moreover, plaintiff's testimony is contradicted and to an extent is inconsistent with the testimony of the maker of the note, who says he received an inquiry from a collection agency concerning it. Haverstick's testimony was explicit that he mailed the note to Hacking Bros. Audit company for collection. There is no testimony as to whether that agency received or did not receive the note. The only evidence tending to prove a conversion is that of the plaintiff, and this evidence is positively denied by Haverstick, who is a disinterested witness and whose testimony apparently the trial court believed. The defendant does not complain of the judgment as entered against it, but plaintiff complains and the entry of a judgment for attorney's fees is without evidence in the record to support it. Since the plaintiff complains and appeals this judgment will be reversed. Costs will be taxed against appellant.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

under the evidence in this respect. It is clear, however, that the
court did not believe the testimony of the witness that the note
the note in question was sent to the defendant's residence.
His knowledge, or consent, however, is not in question. It is
indicated and to an extent is inconsistent with the testimony of
the carrier of the note, who says he received an inquiry from a
collection agency concerning it. The witness's testimony is not
sufficient to establish the note to be a collection note. In the absence of
collection. There is no testimony as to whether the note was re-
ceived or not received by the defendant. The only evidence tending to
prove a variation is that of the defendant, and this evidence is
positively denied by the witness, and is a direct contradiction
and whose testimony is generally the trial court believed. The de-
fendant does not explain the fact that the note was received by the
but without explaining the fact that the note was received by the
test is that out evidence in the record is not sufficient. Since the
defendant's explanation and answer to the question will be treated.
Costs will be taxed against defendant.

REVEREND.

O'Connor, P. J., and McGee, J., concur.

39407

THE O'LAUGHLIN COMPANY, a Corporation,
(Plaintiff) Appellee,

vs.

VILLAGE OF STICKNEY, a Municipal
Corporation, MICHAEL J. FLYNN, as County
Clerk of Cook County, Illinois, and
JOSEPH L. GILL, as Treasurer and County
Collector of Cook County, Illinois,
Defendants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

On Appeal of THE VILLAGE OF STICKNEY,
a Municipal Corporation,
Appellant.

291 I.A. 606'

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Village from a decree stating an account and directing compliance with certain provisions of the Local Improvement act. The cause was heard upon exceptions to the report of a master, and a decree was entered granting relief as prayed. Plaintiff's bill was filed July 25, 1935. A decree for an accounting was entered November 8, 1935, and a final decree was entered December 18, 1936, nunc pro tunc as of November 25, 1936.

The material facts are not in dispute. On October 16, 1929, defendant Village filed a petition in the County court of Cook county for the confirmation of a special assessment. The proceeding was docketed as Stickney Special Assessment No. 13. An assessment role was filed, and final judgment entered against the property assessed on April 29, 1930, for the amount of \$147,836.48, payable in ten installments. The first for the sum of \$16,698.65; the second and succeeding instalments for the sum of \$14,570.87 each. The contract was awarded, completed and accepted, bonds issued in payment to the amount of \$120,900, and plaintiff is the owner of all unredeemed bonds and coupons. The first voucher for work done under the improvement was issued July 15, 1930, and certificate filed in the office of the County clerk on July 21, 1930. On August 18, 1930,

THE O'LAUGHLIN COMPANY, a Corporation,
(Plaintiff) Appellee,

vs.

VILLAGE OF STICKNEY, a Municipal
Corporation, MICHAEL J. ELY, as County
Clerk of Cook County, Illinois, and
JOSEPH L. GILL, as Treasurer and County
Collector of Cook County, Illinois,
Defendants.

ADAM FROM CIRCUIT
COURT OF COOK COUNTY.

On Appeal of THE VILLAGE OF STICKNEY,
a Municipal Corporation,
Appellant.

291 I.A. 606

MR. JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Village from a decree stating an account and directing compliance with certain provisions of the local improvement act. The case was heard upon exceptions to the report of a master, and a decree was entered granting relief as prayed. Plaintiff's bill was filed July 25, 1935. A decree for an accounting was entered November 8, 1935, and a final decree was entered December 18, 1935, hence pro tanto as of November 25, 1935. The material facts are not in dispute. On October 16, 1932,

defendant Village filed a petition in the County court of Cook county for the confirmation of a special assessment. The proceeding was docketed as Stickney Special Assessment No. 13. An assessment role was filed, and final judgment entered against the property assessed on April 29, 1930, for the amount of \$147,836.48, payable in ten installments. The first for the sum of \$16,698.68; the second and succeeding installments for the sum of \$14,570.87 each. The contract was awarded, completed and accepted, bonds issued in payment to the amount of \$120,900, and plaintiff is the owner of all three deemed bonds and coupons. The first voucher for work done under the improvement was issued July 15, 1930, and certificate filed in the office of the County clerk on July 21, 1930. On August 18, 1930,

the clerk of the County court issued its warrant authorizing collection by the Village collector. The first installment became due January 2, 1931, and the second and succeeding installments on January 2, 1932, to 1940, inclusive. The accounting was directed concerning the collections thus made by the village. There was a judgment against the Village and in favor of plaintiff for the total amount of \$19,363.28, composed of the following items: (1) An overdraft upon the first installment which was illegally paid out of subsequent installments of the assessment on account of costs and expenses, \$4,764.98. (2) Collections made by defendant upon installments and applicable to the payment of the principal of the bonds deposited by defendant with other moneys in the First American National Bank of Berwyn, which closed June 18, 1932, \$5,541.76. (3) Amounts collected by defendant on various installments applicable to the payment of interest on bonds held by plaintiff, \$5,550.37. (4) Interest on above items deposited in said closed bank from June 18, 1932, at 5% per annum, until November 25, 1936, \$3,506.17. Total, \$19,363.28, for which amount the decree renders judgment against defendant Village. In addition to this judgment the decree ordered defendant to pay the plaintiff forthwith the sum of \$8,760.70, cash available and applicable to the payment of the principal ^{of} bonds held by plaintiff, and on account of cash on hand and available and applicable to the payment of interest on bonds held by plaintiff, \$4,208.32.

The decree directed that the Village restore the overdraft of \$4,764.98 used for the payment of costs and expenses of the proceeding to the special assessment and pay the same to plaintiff, and that upon the payment thereof it would have credit on the judgment to that amount. The decree also directed that defendant restore to the special assessment the sum of \$238.61 overdraft collected on account applicable to principal of the bonds in the first

the clerk of the County court issued its warrant authorizing collection by the Village collector. The first installment became due January 2, 1931, and the second and succeeding installments on January 2, 1932, to 1940, inclusive. The accounting was directed concerning the collections thus made by the village. There was a judgment against the Village and in favor of plaintiff for the total amount of \$19,363.28, composed of the following items: (1) An over-

draft upon the first installment which was illegally paid out of subsequent installments of the assessment on account of costs and expenses, \$4,764.98. (2) Collections made by defendant upon installments and applicable to the payment of the principal of the bonds deposited by defendant with other moneys in the First American National Bank of New York, which closed June 18, 1932, \$5,841.76. (3) Amounts collected by defendant on various installments applicable to the payment of interest on bonds held by plaintiff.

\$2,250.37. (4) Interest on above items deposited in said closed bank from June 18, 1932, at 8% per annum, until November 25, 1936, \$2,206.17. Total, \$19,363.28, for which amount the decree renders judgment against defendant Village. In addition to this judgment the decree ordered defendant to pay the plaintiff forthwith the sum of \$8,760.70, cash available and applicable to the payment of the principal bonds held by plaintiff, and on account of cash on hand and available and applicable to the payment of interest on bonds held by plaintiff, \$4,208.32.

The decree directed that the Village restore the overpayment of \$4,764.98 used for the payment of costs and expenses of the proceeding to the special assessment and pay the same to plaintiff, and that upon the payment thereof it would have credit on the judgment to that amount. The decree also directed that defendant restore to the special assessment the sum of \$238.61 overpayment collected on account applicable to principal of the bonds in the first

installment and upon so doing receive credit to that amount upon the judgment. The decree also taxed costs against defendant and directed the Village to make the necessary application and levy sufficient taxes, pass necessary ordinances within the taxing powers to effect the payment of the judgment rendered forthwith, and to file a certificate of cost and completion in the County court. The decree also directed that the officials of the City proceed at once to determine the deficiency in Special assessment No. 13, adopt the necessary ordinances and cause the necessary supplemental proceedings to be filed in the County court for the purpose of extending the time of payment of the special assessment and refunding the bonds issued, whether due or to become due, and otherwise comply with the statute relative to procedure for the extension of time for payment of installments of special assessments and refunding securities. The decree also directed that these funds should be kept separate and apart from other funds of the City, and that all funds when paid should be applied pro rata upon outstanding bonds and interest coupons, and a memorial thereof endorsed upon the bonds and coupons.

It is contended in the first place that the decree is erroneous in that it directs the payment to plaintiff of money held by defendant applicable to the payment of bonds not due. As already stated, the accounting was brought down to include April 30, 1936, which was the close of the fiscal year of the Village. The decree was entered November 25, 1936. There were moneys on hand paid to the City in advance applicable to all installments, out of which bonds due or to become due for the years 1932 to 1940 were to be paid. Defendant contends that it was error for the court to decree that the entire amount of cash on hand thus applicable should be paid forthwith to plaintiff. The Village complains that part of this sum was applicable to bonds not yet due and says that while the

instalment and upon as doing receive credit to that amount upon the judgment. The decree also taxed costs against defendant and directed the Village to make the necessary collection and levy sufficient taxes, was necessary ordinances within the time powers to effect the payment of the judgment rendered forthwith, and to file a certificate of cost and collection in the County court. The decree also directed that the officials of the City proceed at once to determine the deficiency in special assessment No. 12, adopt the necessary ordinances and assess the necessary supplemental proceedings to be filed in the County court for the purpose of extending the time of payment of the special assessment and returning the bonds issued, whether due or to become due, and otherwise comply with the statute relative to procedure for the extension of time for payment of instalments of special assessments and returning securities. The decree also directed that these funds should be kept separate and apart from other funds of the City, and that all funds when paid should be applied pro rata upon outstanding bonds and interest coupons, and a memorial thereof entered upon the bonds and coupons.

It is contended in the first place that the decree is erroneous in that it directs the payment to plaintiff of money held by defendant applicable to the payment of bonds not due. As already stated, the accounting was brought down to include April 30, 1938, which was the close of the fiscal year of the Village. The decree was entered November 25, 1938. There were monies on hand paid to the City in advance applicable to all instalments, out of which bonds due or to become due for the years 1938 to 1940 were to be paid. Defendant contends that it was error for the court to decree that the entire amount of each on hand was applicable should be paid forthwith to plaintiff. The Village complains that part of this sum is applicable to bonds not yet due and says that while the

exact amount could not be computed, it approximated \$2700. Defendant says that bonds not yet due may be paid in advance only by action of the village officials, and that their duties in that respect are discretionary under paragraph 169 of the Local Improvement act. (See Ill. State Bar Stats. 1935, chap. 24.) The act in question provides that where there are surpluses and installments applicable to bonds not yet due the Village board shall give direction to the treasurer to select by lot the bonds of such series and in such amount as the surplus will pay and to call these bonds for payment and give notice by publication specifying the number of bonds to be paid in the series selected; the particular bonds to be paid, if full payment is made, and if prorated the series on which partial payment is to be made should be named. After the call date interest ceases on the bonds selected to the amount to be paid thereon. No action was taken by the board of trustees of defendant Village in conformity with this statute, and defendant contends the action of the court in decreeing payment in advance of the surplus applicable to the payment of bonds due December 31, 1936, to December, 1940, inclusive, was a usurpation by the court of the discretionary rights of the board of trustees; that whether these amounts were to be paid at all and in what manner selection of bonds and series was to be made was for the trustees and not the court to decide. It is argued that the court substituted its judgment for that of the board; that it had no jurisdiction to accelerate the due dates of the bonds; that the prerogative so to do was with the trustees alone who were obligated to act in the manner provided by the statute subject to conditions under which the bondholders took the bonds. Defendant relies on Rothschild v. Village of Calumet, 350 Ill. 330, which is the only case cited in its brief. That case does not, we think, sustain defendant's contention. This was a proceeding in equity. We hold that the court had juris-

exact amount could not be computed, it approximated \$23700. De-
 fendant says that bonds not yet due may be paid in advance only
 by action of the village officials, and that their duties in that
 respect are discretionary under paragraph 199 of the model in-
 strument act. (See Ill. State Bar J., 1935, Chap. 24.) The
 act in question provides that where there are surplus and install-
 ments applicable to bonds not yet due the Village Board shall give
 direction to the treasurer to select by lot the bonds of such se-
 ries and in such amount as the surplus will pay and to call there-
 on for payment and give notice by publication specifying the
 number of bonds to be paid in the series selected; the particular
 bonds to be paid, if full payment is made, and if provided the
 series on which partial payment is to be made shall be named.
 After the call date interest ceases on the bonds selected to the
 amount to be paid thereon. No action was taken by the board of
 trustees of defendant Village in conformity with this statute, and
 defendant contends the action of the court in ordering payment in
 advance of the surplus applicable to the payment of bonds due Decem-
 ber 31, 1938, to December, 1940, inclusive, was a usurpation by the
 court of the discretionary rights of the board of trustees; that
 whether these amounts were to be paid at all and in what manner selec-
 tion of bonds and series was to be made was for the trustees and not
 the court to decide. It is argued that the court substituted its
 judgment for that of the board; that it had no jurisdiction to
 accelerate the due dates of the bonds; that the prerogative was to go
 was with the trustees alone who were obligated to act in the manner
 provided by the statute subject to conditions under which the bond-
 holders took the bonds. Defendant relies on Holmes v. Village
of Calumet, 350 Ill. 333, which is the only case cited in its
 brief. That case does not, we think, sustain defendant's contention.
 This was a proceeding in equity. We hold that the court had juris-

diction to give this relief and decree payment and application of all moneys collected pro rata upon bonds and interest coupons. Defendant practically admitted that the court had jurisdiction of the parties and of the subject matter by submitting its account concerning the collection of the moneys in question. In the Rothschild case the Supreme court said:

"The theory of the Statute is, that the bonds issued against each installment of the assessment, together with the interest on them, will be paid as the installment and the interest on it are collected."

Plaintiff here was the owner of all the outstanding bonds. There could be no possible disadvantage to the Village in paying funds on hand applicable to bonds due in the future. On the contrary an advantage would accrue to the city in stopping the further accrual of interest on such bonds and the danger that the moneys might be lost by bank failures, etc. If all the property owners, after the assessment was confirmed, had paid their assessments at once, the plaintiff would have been under no obligation to wait for payment of its bonds until the bonds matured. The interest stopped when the assessment was paid. It is apparent, we think, that the date of maturity of the bonds bears relation only to the due date of the particular installment of the assessment and not to the liability of the Village to account for moneys collected. It is true the statute prescribes a method by which the trustees of the village may call these bonds and apply the funds, but that method is not exclusive nor do we think it can be said that the action of the trustees in that respect is wholly legislative in character. On the contrary it appears to be a purely administrative act and mandatory in its nature. Equity having acquired jurisdiction will not require the plaintiff to resort to mandamus to compel the trustees to comply with paragraph 169 when the same end can be accomplished directly in an equitable proceeding. Paragraph 169

action to give this relief and decree payment and satisfaction of all moneys collected pro rata upon bonds and interest coupons. Defendant practically admitted that the court had jurisdiction of the parties and of the subject matter by exhibiting its account concerning the collection of the moneys in question. In the

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"The theory of the statute is, that the bonds issued against each installment of the assessment, together with the interest on them, will be paid as the installment and the interest on it is collected."

Plaintiff here was the owner of all the outstanding bonds. There could be no possible disadvantage to the Village in paying funds on and applicable to bonds due in the future. On the contrary an advantage would accrue to the city in stopping the further accrual of interest on such bonds and the danger that the moneys might be lost by bank failures, etc. It all was properly owners, after the assessment was confirmed, had paid their

assessments at once, the plaintiff would have been under no obligation to wait for payment of its bonds until the bonds matured. The interest stopped when the assessment was paid. It is apparent,

we think, that the date of maturity of the bonds bears relation only to the due date of the particular installment of the assessment and not to the liability of the Village to account for moneys collected. It is true the statute prescribes a method by which the trustees of the village may call these bonds and apply the funds, but that method is not exclusive nor do we think it can be said that the action of the trustees in that respect is wholly legislative in character. On the contrary it appears to be a purely administrative act and mandatory in its nature. Hardly having acquired jurisdiction will not require the plaintiff to resort to mandamus to compel the trustees to comply with paragraph 103 when the same can be accomplished directly in an equitable proceeding. Paragraph 103

covers the situation and gives a remedy to compel distribution in the event the trustees take no action. It is not intended to cover a situation where, as here, the court of equity has already taken jurisdiction. Indeed this seems to have been the construction put upon this act by the officers of the Village, who testified that there were two different methods of paying bonds and interest coupons in special assessments. One through a court order requiring the payment of a certain amount upon a bond pro-rata, and the other through the action of the village board of trustees directing payment. The officials paid bonds and coupons of this kind either upon order of the board or the order of a court. This is consistent with the theory that moneys collected are trust funds applicable to the bonds issued and equity has jurisdiction of that fund to direct the distribution. Moreover, the defendant here, in keeping its accounts, made no segregation of the moneys collected as against bonds due and yet to become due. It is hardly in a position now to complain. The decree does not in this respect in any way wrong the defendant.

It is urged the court erred in allowing interest upon moneys lost in the bank failure which covered a period of time when the money so lost was not due to plaintiff. We hold this interest was properly chargeable to the defendant under section 2 of the Interest act as and for money had and received to the use of the plaintiff without its knowledge. Wells v. Village of Wilmette, 193 Ill.App. 30; Rothschild v. Village of Calumet, 350 Ill. 330-40. The findings of the master as approved by the chancellor show that defendant and its officials entirely failed to comply with their duties as trustees with respect to these funds. Plaintiff made repeated requests to have the money collected applied upon the indebtedness due to it. Defendant's officials not only failed to comply but mingled the funds and failed to keep books of account

covers the situation and gives a remedy to compel distribution in the event the trustees take no action. It is not intended to cover a situation where, as here, the court of equity has already taken jurisdiction. Indeed this seems to have been the construction put upon this act by the officers of the Village, who testified that there were two different methods of paying bonds and interest coupons in special assessments. One through a court order requiring the payment of a certain amount upon a bond pro rata, and the other through the action of the village board of trustees directing payment. The officials paid bonds and coupons of this kind either upon order of the board or the order of a court. This is consistent with the theory that money collected are trust funds applicable to the bonds issued and equity has jurisdiction of that fund to direct the distribution. Moreover, the defendant here, in keeping its accounts, made no segregation of the money collected as against bonds due and yet to become due. It is hardly in a position now to complain. The decree does not in this respect in any way wrong the defendant.

It is urged the court erred in allowing interest upon money lost in the bank failure which covered a period of time when the money so lost was not due to plaintiff. We hold this interest was properly chargeable to the defendant under section 2 of the interest act as and for money had and received to the use of the plaintiff without its knowledge. Wells v. Village of Wilmette, 193 Ill. App. 30; Rotenschield v. Village of Oakland, 330 Ill. 330-40. The findings of the master as approved by the chancellor show that defendant and its officials entirely failed to comply with their duties as trustees with respect to these funds. Plaintiff made repeated requests to have the money collected applied upon the indebtedness due to it. Defendant's officials not only failed to comply but mingled the funds and failed to keep books of account

showing the true situation. The master did not recommend the allowance of interest upon the funds that were in the bank. Plaintiff objected to the finding of the master, and the master overruled his objection, but the chancellor sustained this exception and allowed interest at the statutory rate from June 18, 1932. Interest was allowed, as we understand it, not because the money was negligently lost in the bank but because a trustee had without warrant held the money and refused payment to the person entitled. Upon clear principles we think the allowance of this interest was just and proper.

We are not impressed by the contention of defendant that the court by its decree intruded its jurisdiction into governmental affairs by interfering with the discretion of the municipality. The direction of the decree that the Village should institute a deficiency and refunding proceeding under section 86A of the Local Improvement act was by stipulation of the parties. In the reply brief defendant withdraws its objection thereto. The other directions of which defendant complains were general in their nature and in order to compel the execution thereof it will be necessary for plaintiff again to apply to a court of equity. It should not, in that case, be necessary to begin a separate proceeding. The defendant reminds us that, "a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." Defendant is a trustee. Submission by it to the rules applicable to those who assume the duties of such a position will not prove destructive of fundamental rights.

The judgment is just and is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

showing the true situation. The master did not recognize the allowance of interest upon the funds lost in the bank. Plaintiff objected to the finding of the master, and the master overruled his objection, but the chancellor sustained his exception and allowed interest at the statutory rate from June 15, 1932.

Interest was allowed, as we understand it, not because the money was negligently lost in the bank but because a trustee and without warrant held the money and refused payment to the person entitled. Upon clear principles we think the allowance of this interest was just and proper.

We are not impressed by the contention of defendant that the court by its decree intruded its jurisdiction into governmental affairs by interfering with the discretion of the municipality. The direction of the decree that the Village should institute a deficiency and refunding proceeding under section 36A of the Local Improvement act was by stipulation of the parties. In the reply brief defendant withdrew its objection thereto. The other directions of which defendant complains were general in their nature and in order to compel the execution thereof it will be necessary for plaintiff again to apply to a court of equity. It should not, in that case, be necessary to begin a separate proceeding. The defendant reminds us that, "a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." Defendant is a trustee. Submission by it to the rules applicable to those who assume the duties of such a position will not prove destructive of fundamental rights.

The judgment is just and is affirmed.

APPROVED.

O'Connor, P. J., and McGarry, J., concur.

39340

CLAUDE NEON FEDERAL COMPANY,
a corporation,

Appellant,

v.

JOHN RACYZKOWSKI, doing business
as EAST SIDE MOTOR SALES COMPANY,
Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

291 I.A. 607¹

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

November 22, 1928, the parties hereto entered into a written agreement whereby plaintiff undertook to furnish and maintain an electric advertising display, for which defendant agreed to pay \$34 a month in advance during the life of the agreement. Thereafter defendant defaulted in the payment of one or more of the monthly installments, and plaintiff brought suit to recover the installments due under the agreement and a sum stipulated in the contract as damages for the breach thereof. By way of defense there was a denial that defendant owed anything to plaintiff, and he averred that March 8, 1932, defendant offered to compromise the claim, after suit was instituted, by paying \$170 in installments, with the understanding that when said amount was paid plaintiff was to renew the advertising services; that \$170 was paid by defendant, and accepted in full satisfaction and discharge of plaintiff's claim, but that plaintiff, nevertheless, failed and refused to renew the services, as agreed. Plaintiff replied by denying that it had entered into any agreement to release its cause of action, and

39340

CLAUDE NEON LIGHT COMPANY,
a corporation,
Plaintiff,

v.

JOHN RACHYKOWSKI, doing business
as EAST SIDE MOTOR SALES COMPANY,
Appellee.

ALLIANCE TRADING COMPANY
COUNT, JACK COUNTY.

2911 A. 607

MR. PRESIDING JUDGE FRIED
DELIVERED THE OPINION OF THE COURT.

November 22, 1932, the parties hereto entered into a written agreement whereby plaintiff undertook to furnish and maintain an electric advertising display, for which defendant agreed to pay \$25 a month in advance during the life of the agreement. Thereafter defendant defaulted in the payment of one or more of the monthly installments, and plaintiff brought suit to recover the installments due under the agreement and a sum stipulated in the contract as damages for the breach thereof. By way of defense there was a denial that defendant owed anything to plaintiff, and he averred that March 2, 1932, defendant offered to compromise the claim, after suit was instituted, by paying \$170 in installments, with the understanding that when said amount was paid plaintiff was to renew the advertising service; that \$170 was paid by defendant, and accepted in full satisfaction and discharge of plaintiff's claim, but that plaintiff, nevertheless, failed and refused to renew the service, as agreed. Plaintiff replied by denying that it had entered into any agreement to release its cause of action, and

alleged that \$170 was received, not in full satisfaction of its claim but in payment of services previously rendered defendant, and in addition to its claim for damages set forth in the complaint.

Among other ground for reversal it is urged that the trial court prejudged the case and failed to conduct the trial in a fair and impartial manner, without prejudice to plaintiff's rights. Inasmuch as the cause will have to be retried, it would serve no useful purpose to recite the facts in detail. It is obvious, of course, that the burden of establishing the plea of compromise and satisfaction rested upon defendant, who interposed the plea. Nevertheless, before plaintiff had completed its case the court evidently placed upon it the burden of disproving defendant's case and seriously interfered with the orderly introduction of evidence. A fair indication of the attitude of the court toward plaintiff's claim for damages may be had from the following excerpts of the evidence.

"The Witness: At the time the plaintiff elected to declare the defendant had breached the contract there was owing to the defendant - \$170 and liquidated damages.

"The Court: No, No, you don't have to say anything about liquidated damages, that is not for you to say, that is for the Court to say.

"Mr. Cahill: Now, under the terms of the contract, how much was due as liquidated damages?

"The Court: What difference does it make, if you paid it?

"The Witness: That is right. Suit was started in the Circuit Court. He accepted \$170 for delinquent installments.

"The Court: Never mind what he took it for.

"The Court: The \$170 settlement - when that case was dismissed you were there and you took that money in full settlement, you didn't have any formal release. You don't suppose people are crazy enough to pay \$170 and then have a lawsuit hanging over them to be tried, you don't think the man is insane.

"Mr. Cahill: Your Honor may we decide that point later?

"The Court: No, we will decide it now. If it is agreed that the attorney took \$170 from this defendant, and the lawsuit was then finally dismissed for want of prosecution, the Court

alleged that \$150 was received, not in full satisfaction of its claim but in payment of services previously rendered defendant, and in addition to its claim for damages set forth in the complaint. Among other grounds for reversal it is urged that the trial court prejudged the case and failed to conduct the trial in a fair and impartial manner, without prejudice to plaintiff's rights. Inasmuch as the cause will have to be retried, it would serve no useful purpose to recite the facts in detail. It is obvious, of course, that the burden of establishing the plea of compromise and satisfaction rested upon defendant, who interposed the plea. Nevertheless, before plaintiff had completed its case the court evidently placed upon it the burden of disproving defendant's case and seriously interfered with the orderly introduction of evidence. A fair indication of the attitude of the court toward plaintiff's claim for damages may be had from the following excerpts of the evidence.

"The Witness: At the time the plaintiff elected to declare the defendant had breached the contract there was owing to the defendant - \$150 and liquidated damages.

"The Court: No, No, you don't have to say anything about liquidated damages, that is not for you to say, that is for the Court to say.

"Mr. Cahill: Now, under the terms of the contract, how much was due as liquidated damages?

"The Court: What difference does it make, if you paid it?

"The witness: That is right. Suit was started in the Circuit Court. He accepted \$150 for delinquent installments.

"The Court: Never mind what he took it for.

"The Court: The \$150 settlement - when that case was dismissed you were there and you took that money in full settlement, you didn't have any formal release. You don't suppose people are crazy enough to pay \$150 and then have a lawsuit hanging over them to be tried, you don't think the man is insane.

"Mr. Cahill: Your Honor may we decide that point later?

"The Court: No, we will decide it now. If it is agreed that the attorney took \$150 from this defendant, and the lawsuit was then finally dismissed for want of prosecution, the Court

realizes as a matter of law that was in full settlement of everything whether technically in that language or not.

"Mr. Cahill: Your Honor has the wrong impression. No such facts like that occurred.

"The Court: Oh, is that so? Well, what is the man paying the lawyer \$170 for, what?

"The Court: No, I don't rule that is a matter of defense. I rule as a matter of law, if as a matter of fact the attorney in that lawsuit - when they were suing, they must put all of their claims in one basket, and they filed their lawsuit, and, in their lawsuit they set up liquidated damages.

"The Court: I don't want to hear anymore about this matter. Go on with your case. It looks to me like a holdup. Go on.

"The Court: Let him put it in. I am interested in the idea, telling me a man has a lawsuit pending, he pays \$170, and is going to let the question of liquidated damages remain over him to be decided, then he ought to be sent to an insane asylum, that is where he should go. What was your client's lawyer?

"The Court: One thing this Court never tolerates if it can, that is, anything that looks in the nature of a forfeiture or liquidated damages in cases of this kind. Liquidate, my eye. There is nothing to liquidate. Nobody was hurt, how were you injured?

"Q. Did Mr. Raczynowski ever request the renewal of the service?

"The Court: He did not have to request it.

"Mr. Raczynowski: I have heard the letter from Mr. Pollach to my attorney read a couple of times.

"The Court: What do you want him to read it for?

"The Court: He don't have to understand it as long as he has a lawyer.

"The Court: Finding the issues for the defendant.

"Mr. Cahill: Your Honor -

"The Court: I do not want to hear the case argued."

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thing whether technically in that language or not.

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"The Court: No, I don't rule that is a matter of defense.
I rule as a matter of law, it is a matter of fact the attorney in
that lawsuit - when they were suing, they want out all of their
claims in one basket, and they filed their lawsuit, and, in their
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idea, telling me a man has a lawsuit pending, he pays \$170, and is
going to let the question of liquidated damages remain over him
to be decided, then he ought to be sent to an insane asylum, that
is where he should go. What was your client's lawyer?

"The Court: One thing this Court never tolerates it is
can, that is, anything that looks in the nature of a forfeiture
or liquidated damages in cases of this kind. Liquidate, my eye.
There is nothing to liquidate. Nobody was hurt, how were you
injured?

"Q. Did Mr. Reazkykowski ever request the renewal of the
services?

"The Court: He did not have to request it.

"Mr. Reazkykowski: I have heard the letter from Mr. Pollack
to my attorney read a couple of times.

"The Court: What do you want him to read it for?

"The Court: He don't have to understand it as long as he
has a lawyer.

"The Court: Finding the issues for the defendant.

"Mr. Cahill: Your Honor -

"The Court: I do not want to hear the case argued."

It appears from the foregoing quotation that at the very outset, when the term "liquidated damages" was first mentioned by plaintiff's counsel, the trial court announced that "it never tolerates anything in the nature of a forfeiture or liquidated damages," without first inquiring into the nature of the contract or the circumstances of the case, and expressed the opinion that plaintiff's suit "looks to me like a holdup." The law recognizes the doctrine of liquidated damages under certain circumstances, and it was improper for the court to decide the issue before him on his own experience instead of upon the evidence which plaintiff sought to adduce upon the hearing. It has been frequently stated that "the law guarantees to all a fair and impartial trial, and courts are organized for the purpose of seeing that the laws are administered in such a manner that justice will be done to all." (Andreas v. Ketcham, 77 Ill. 377.) It is fundamental in our law that the trial judge "should free his mind from mere predilection of personal and private character which would prevent him from holding level the scales of justice, no matter *** what may be the subject of litigation." (Hyatt on Trial, vol. 2, sec. 1001, p. 1027.) The announcement in advance by the trial judge that he never tolerates anything in the nature of a forfeiture or liquidated damages, without knowing all the facts and circumstances of the case, amounts to a denial of justice. When the pronouncements hereinbefore quoted were made plaintiff had only begun to adduce the evidence that it had in support of its claim, and the decision was manifestly reached before the facts in the case were presented to the court. The cause was prejudged and not determined by the law and the evidence. If the court had any personal predilection toward the subject matter of the litigation it should have assigned the case to another judge who was not so disposed. We do not pass upon the merits of the litigation, but the cause

It appears from the foregoing that at the very outset, when the term "independent damages" was first mentioned by plaintiff's counsel, the trial court announced that "it never tolerates anything in the nature of a forfeiture or independent damages," without first inquiring into the nature of the contract or the circumstances of the case, and expressed the opinion that plaintiff's suit "looks to me like a forfeiture." The law requires the setting of it into the damages under certain circumstances, and it was improper for the court to decide the issue before him on his own evidence instead of upon the evidence which plaintiff sought to adduce upon the hearing. It has been repeatedly stated that "the law guarantees to all a fair and impartial trial, and courts are organized for the purpose of hearing that the law is administered in such a manner that justice will be done to all." (Andrew v. Lehigh, 77 Ill. 277.) It is fundamental in our law that the trial judge "should free his mind from any predilection of personal and private character which would prevent him from holding level the scales of justice, no matter what may be the subject of litigation." (East on Trial, vol. 2, sec. 1011, p. 1027.) The announcement in advance by the trial judge that he never tolerates anything in the nature of a forfeiture or independent damages, without knowing all the facts and circumstances of the case, amounts to a denial of justice. When the pronouncements heretofore quoted were made, plaintiff had only begun to adduce the evidence that it had in support of its claim, and the decision was manifestly reached before the facts in the case were presented to the court. The cause was prejudged and not determined by the law and the evidence. If the court had any predilection toward the subject matter of the litigation it should have assigned the case to another judge who was not so disposed. We do not pass upon the merits of the litigation, but the cause

will have to be retried. Therefore, the judgment of the Superior court is reversed and the cause remanded with directions that it be tried according to the law and the evidence.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

will have to be retried. Therefore, the judgment of the Superior court is reversed and the cause remanded with instructions that it be tried according to the law and the evidence.

JULIUS REVEREND AND CAUSE REMANDED WITH INSTRUCTIONS.

Reverend and Sullivan, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

39452

W. R. MITCHELL, doing business as
W. R. MITCHELL & COMPANY,
Appellee,

v.

THOMAS J. KANE and KANE FUEL COMPANY,
a corporation,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

291 I.A. 607²

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a claim in the municipal court for services rendered to defendants in connection with a proposed loan on property at 1801-45 North Ashland avenue, Chicago, owned by defendant Thomas J. Kane, and under lease to defendant Kane Fuel Company, a corporation. The cause was tried by the court without a jury, resulting in a finding and judgment in favor of plaintiff for \$350. By this appeal defendants seek to reverse the judgment.

The statement of claim alleges in substance that plaintiff rendered services in submitting the original application for a loan of \$35,000 to various purchasers of real estate mortgages, consultations with Hugh Peterson, C. W. & F. Coal Company, Bell & Zoller, Atwill Coal & Coke Company, and also the preparation and submission of application to Reconstruction Finance Corporation Mortgage Company, preparation and submission of application to Reconstruction Finance Corporation in the name of Thomas J. Kane, and submission of application to Reconstruction Finance Corporation in the name of Kane Fuel Company; and it is averred that the fair and reasonable charge for such services is \$350.

The affidavit of merits states that Thomas J. Kane is one of the defendants and the duly authorized agent for Kane

30452

W. R. MITCHELL, doing business as
W. R. MITCHELL & COMPANY,
Appellees,

v.

THOMAS J. KANE and KANE FUEL COMPANY,
a corporation,
Appellants.

APPEAL FROM DECISION

COURT OF CHICAGO.

SEI I. A. 607

MR. PRESIDING JUSTICE, THE COURT,
H. H. HARRIS, JUDGE OF THE COURT.

Plaintiff filed a claim in the municipal court for services rendered to defendants in connection with a proposed loan on property at 1801-45 North LaSalle Avenue, Chicago, owned by defendant Thomas J. Kane, and under lease to defendant Kane Fuel Company, a corporation. The case was tried by the court without a jury, resulting in a finding and judgment in favor of plaintiff for \$350. By this appeal defendants seek to reverse the judgment.

The statement of claim alleges in substance that plaintiff rendered services in submitting the original application for a loan of \$35,000 to various purchasers of real estate mortgages, consultations with Hugh Peterson, C. E. & F. Bond Company, Bell & Koller, Atwill Coal & Coke Company, and also the preparation and submission of application to Reconstruction Finance Corporation Mortgage Company, preparation and submission of application to Reconstruction Finance Corporation in the name of Thomas J. Kane, and submission of application to Reconstruction Finance Corporation in the name of Kane Fuel Company; and it is averred that the latter and responsible charge for such services is \$350.

The affidavit of merits states that Thomas J. Kane is one of the defendants and the duly authorized agent for Kane

Fuel Company, a corporation. He denies that at the time plaintiff proposed to obtain a loan on the property, defendants agreed that they be charged for services which plaintiff might render in connection with the obtaining of such a loan; that on or about February 26, 1936, plaintiff proposed that he could obtain a loan from the Reconstruction Finance Corporation of \$35,000, for which he asked as his compensation \$1,000 if the loan were obtained; that defendants signed an application with the Reconstruction Finance Corporation which was turned down, and that subsequently plaintiff induced defendants to sign another application with the Reconstruction Finance Corporation in the name of Kane Fuel Company, and plaintiff agreed before applying for the loan that he would charge the corporation \$1,000 for services if the loan were obtained; that defendants signed the application as requested by plaintiff, but after the expiration of thirty days plaintiff required defendants to give him additional time of six months, to which defendants did not agree, and thereupon plaintiff refused to act further in endeavoring to procure the loan.

The sole question of fact presented and as stated in their brief by defendants, is "Whether plaintiff is to be paid for services rendered in trying to obtain a loan on defendants' property, irrespective of whether the loan is obtained or not, or whether he is to be paid for services contingently on the loan being obtained." Upon this question plaintiff adduced the following proof.

Called as a witness on his own behalf plaintiff testified that he was a licensed real estate broker, engaged in the real estate and mortgage business. In February, 1936, Kane called him on the telephone, saying that he would like to have plaintiff's assistance in procuring a loan on his property, which consisted of a coal yard; that plaintiff then told him it was impossible to get a loan on a coal yard, inasmuch as it was a single purpose enterprise and loans were not made on that sort of property, "unless

Fuel Company, a corporation. He denies that at the time Plaintiff proposed to obtain a loan on the property, defendants agreed that they be charged for services which Plaintiff might render in connection with the obtaining of such a loan; that on or about February 22, 1936, Plaintiff proposed that he would obtain a loan from the Reconstruction Finance Corporation of \$25,000, for which he asked as his compensation \$1,000 if the loan were obtained; that defendants agreed to sign an application with the Reconstruction Finance Corporation which was turned down, and that subsequently Plaintiff induced defendants to sign another application with the Reconstruction Finance Corporation in the name of Kane Fuel Company, and Plaintiff agreed before applying for the loan that he would charge the corporation \$1,000 for services if the loan were obtained; that defendants agreed to sign the application as requested by Plaintiff, but after the expiration of thirty days Plaintiff refused to return to give him additional time of six months, to which defendants did not agree, and thereupon Plaintiff refused to act further in endeavoring to procure the loan.

The sole question of fact presented and as stated in their brief by defendants, is "whether Plaintiff is to be paid for services rendered in trying to obtain a loan on defendants' property, irrespective of whether the loan is obtained or not, or whether he is to be paid for services contingently on the loan being obtained." Upon this question Plaintiff advanced the following proof.

Called as a witness on his own behalf Plaintiff testified that he was a licensed real estate broker, engaged in the real estate and mortgage business. In February, 1936, he called him on the telephone, saying that he would like to have Plaintiff's assistance in procuring a loan on his property, which consisted of a coal yard; that Plaintiff then told him it was impossible to get a loan on a coal yard, inasmuch as it was a kind of waste enterprise and loans were not made on that sort of property. "Unless

there is some diversification of interest;" that Kane then told plaintiff that he had a filling station on the north end of his property and an industrial building on the south end, and a coal yard, which was personally owned by Kane and leased to the Kane Fuel Company, a corporation owned by him. Plaintiff thereupon asked for a statement of income and expenses which was given and submitted to various insurance companies, all of whom refused the loan. This was reported to Kane and plaintiff then told him that his services were at an end so far as he was concerned, but suggested that the Reconstruction Finance Corporation Mortgage Company and the Reconstruction Finance Corporation itself could give him some assistance, and he told Kane, "Well, Mr. Kane, I think you can do everything for yourself down there that I can do for you. All I can do is gather the information together and fill the application blank and do the work, and I don't see why you cannot do that and save yourself some money. Furthermore, I have had no experience, up to now, in making loans with the Reconstruction Finance Corporation," and he said to Kane that the Reconstruction Finance Corporation did not permit the payment of contingent fees, and referred him to a booklet of the Reconstruction Finance Corporation setting forth the provision that "payment of bonuses, fees or commissions for the purpose of or in connection with obtaining loans is prohibited." Plaintiff testified that in response to these suggestions Kane then said: "You go ahead and I will take care of you." Plaintiff secured the application blanks from the Reconstruction Finance Corporation Mortgage Company which were prepared and submitted, but the application was refused because it indicated no existing "distress", inasmuch as the mortgage on Kane's property was not due until 1938. Plaintiff said Kane had not apprised him there was a foreclosure proceeding pending, but when he subsequently learned these facts he suggested that the application be amended, showing the foreclosure. The amended application

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was then submitted and again refused by the Reconstruction Finance Corporation Mortgage Company, who rejected the loan because it did not meet its requirements. Thereafter plaintiff filled out a preliminary application with the Reconstruction Finance Corporation, Kane signed the application as president of Kane Fuel Company, and the application was again submitted and refused.

About this time, plaintiff testified, he spoke to Kane, saying: "I have been putting in a tremendous amount of time on your affairs; I have a secretary to pay, telephone bills to pay, rent to pay; you pay me something on account." Plaintiff said that Kane seemed rather astonished, but asked, "Well, how much are you going to charge me for all this work?" to which he replied, "Well, my thought is, Mr. Kane, the whole fee on this should be somewhere about \$2,000." Kane thought this was too much, and plaintiff then said, "All right, that's what I think. Now, what do you think?" to which Kane replied, "I think \$1,000, if you get the loan." Plaintiff said that he then told Kane "I have already explained to you a number of times that fees on government loans cannot be contingent. This is a cash proposition." After some further conversation Kane replied, "all right, my boy, I will take care of you."

This conversation was corroborated by Laura Fried, called as a witness on behalf of plaintiff. She testified that she overheard Kane and plaintiff talking about payment for services at the time one of the applications was to be submitted to the Reconstruction Finance Corporation, and that plaintiff told Kane, "Naturally, there can be no commission charge, but there could be a charge for services rendered," and that Kane said, "Yes, I understand that, I will take care of you, you go right ahead."

Thomas J. Kane, testifying in his own behalf, insisted that he promised to pay plaintiff a fee of \$1,000 in the event the loan was procured, and that he acceded to the various suggestions made

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This conversation was corroborated by Lewis Fried, called as a witness on behalf of Plaintiff. He testified that the overheard Kane and Plaintiff talking about payment for services at the time one of the applications was to be submitted to the Reconstruction Finance Corporation, and that Plaintiff told Kane, "Naturally, there can be no commission charge, but there could be a charge for services rendered," and that Kane said, "Yes, I understand that, I will take care of you, you do right ahead."

Thomas J. Kane, testifying in his own behalf, insisted that he promised to pay Plaintiff a fee of \$1,000 in the event the loan was procured, and that he acceded to the various suggestions made

by plaintiff for filing applications with the Reconstruction Finance Corporation Mortgage Company and the Reconstruction Finance Corporation, had his books audited in accordance with the requirements of the Reconstruction Finance Corporation, and a survey made of the property, for which he paid fees aggregating some \$350. He denied that he had agreed to pay plaintiff for services, except in the event a loan was consummated. His attorney, William Shapiro, corroborated some of Kane's testimony.

There was thus presented to the court the simple question of fact as to whether or not plaintiff was to be paid for his services in any event, or contingently upon the procuring of the loan. We have examined the abstract carefully, and while the evidence is conflicting we cannot say that the finding of the court was contrary to the manifest weight of the evidence. It is undisputed that plaintiff was requested to render services for defendants and that he spent considerable time and effort in making applications through various sources, including the Reconstruction Finance Corporation Mortgage Company and the Reconstruction Finance Corporation. Undoubtedly Kane was fully apprised of the rules of the Reconstruction Finance Corporation, which prohibit the payment of bonuses, fees or commissions in connection with obtaining loans. It therefore seems reasonable to suppose that in connection with these applications Kane agreed to compensate plaintiff for his services without regard to the successful consummation of the loan, and the court so found.

The only ^{other} ground urged for reversal is that in actions ex contractu, when defendants are sued jointly, plaintiff must prove a cause of action against all the defendants sued; otherwise he will not be entitled to judgment against any. The evidence shows that Mitchell's services were at all times performed for defendants together, and that defendant Kane was president and sole owner of Kane Fuel Company; that he sought Mitchell's services, both on his

by plaintiff for filing applications with the Reconstruction Finance Corporation Mortgage Company and the Reconstruction Finance Corporation, had his books audited in accordance with the requirements of the Reconstruction Finance Corporation, and a survey made of the property, for which he paid less aggregating some \$350. He denied that he had agreed to pay plaintiff for services, except in the event a loan was consummated. His attorney, William Shapiro, corroborated some of Kane's testimony.

There was thus presented to the court the simple question of fact as to whether or not plaintiff was to be paid for his services in any event, or contingently upon the procuring of the loan. We have examined the abstract carefully, and while the evidence is conflicting we cannot say that the finding of the court was contrary to the manifest weight of the evidence. It is undisputed that plaintiff was requested to render services for defendants and that he spent considerable time and effort in making applications through various sources, including the Reconstruction Finance Corporation Mortgage Company and the Reconstruction Finance Corporation. Undoubtedly Kane was fully apprised of the rules of the Reconstruction Finance Corporation, which prohibit the payment of bonuses, fees or commissions in connection with obtaining loans. It therefore seems reasonable to suppose that in connection with these applications Kane agreed to compensate plaintiff for his services without regard to the successful consummation of the loan, and the court so found.

The only ^{other} ground urged for reversal is that in actions ex contractu, when defendants are sued jointly, plaintiff must prove cause of action against all the defendants sued; otherwise he will not be entitled to judgment against any. The evidence shows that Mitchell's services were at all times performed for defendants together, and that defendant Kane was president and sole owner of Kane Fuel Company; that he sought Mitchell's services, both on his

own behalf and that of the company, and that Mitchell rendered services for both. Under the circumstances he was entitled to a judgment against both defendants.

The reasonableness of the sum sued for is not denied by the affidavit of merits, nor does the defense raised in any way question the reasonableness of the amount allowed. We find no convincing reason for reversing the judgment and it is therefore affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

own behalf and that of the company, and that it is not in the interest of the company to do so. Under the circumstances he was entitled to a judgment against both defendants.

The responsibility of the company was not denied by the plaintiff of merit, nor does the defense raise in any way question the responsibility of the company. The finding is convincing reason for reversing the judgment and it is therefore affirmed.

THE COURT.

Reversed and affirmed, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

39308

OWEN BARTON JONES and GEORGE A.
BATES,

Appellees,

v.

COMMONWEALTH EDISON COMPANY, PUBLIC
SERVICE COMPANY OF NORTHERN ILLINOIS,
NORTHERN INDIANA PUBLIC SERVICE COM-
PANY, WESTERN UNITED GAS AND ELECTRIC
COMPANY, JAMES SIMPSON, EDWARD J.
DOYLE, SEWELL L. AVERY, L. E. BLOCK,
JOSEPH M. CUDAHY, THOMAS E. DONNELLEY,
SOLOMON A. SMITH and ALBERT H. WETTEN,
Appellees.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

291 I.A. 607³

EDWARD A. LESLIE, (Intervening Peti-
tioner)

Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The bill of complaint as amended was filed by complainants on behalf of themselves as stockholders of Commonwealth Edison Company and such other stockholders of said company as might desire to join as complainants and "bear their share of the expense of this litigation." The bill was brought to have certain alleged agreements and practices between Commonwealth Edison Company, Public Service Company of Northern Illinois, Northern Indiana Public Service Company and Western United Gas and Electric Company, relating to interchange energy declared fraudulent and void as to Commonwealth Edison Company. The bill also asks for an accounting of all sums improperly diverted. The original bill was filed on December 13, 1933. The amended bill was filed June 17, 1935, and the answers of all of the defendants were filed on October 14, 1935. On September 2, 1936, Edward A. Leslie, claiming to own ten shares of

23303

OWEN BAYTON JONES and GEORGE A. JONES, Appellees,

v.

COMMONWEALTH Edison Company, Public Service Company of Northern Illinois, Northern Indiana Public Service Company, Western United Gas and Electric Company, James Simpson, Edward J. Doyle, Samuel E. Avery, E. H. Block, Joseph M. Gudary, Thomas E. Donnelly, Solomon A. Smith and Albert H. Miller, Appellants.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

231 I.A. 607

EDWARD A. MILLER, (Intervening Petitioner) Appellant.

MR. JUSTICE MCANULTY delivered the opinion of the court.

The bill of complaint as amended was filed by complainant on behalf of themselves as stockholders of Commonwealth Edison Company and such other stockholders of said company as might desire to join as complainants and "bear their share of the expense of this litigation." The bill was brought to have certain alleged agreements and practices between Commonwealth Edison Company, Public Service Company of Northern Illinois, Northern Indiana Public Service Company and Western United Gas and Electric Company, relating to interchange energy declared fraudulent and void as to Commonwealth Edison Company. The bill also asks for an accounting of all sums improperly diverted. The original bill was filed on December 13, 1933. The amended bill was filed June 17, 1935, and the answers of all of the defendants were filed on October 14, 1935. On September 2, 1936, Edward A. Miller, claiming to own ten shares of

stood in the Edison Company, presented to the trial court the following "Petition for Leave to Intervene" in the cause:

"Your petitioner, Edward A. Leslie, respectfully shows:

"1. The original Bill of Complaint in the above entitled and numbered cause was filed on December 13, 1933. By leave of court, an amended Bill of Complaint was filed June 17, 1935, and all defendants put in their answers to said amended Bill of Complaint on October 14, 1935. On May 14, 1936, an order was entered by the court directing that all proceedings thereafter be had therein be governed by the Civil Practice Act. So far as can be ascertained from the records of the court, no hearing has been had upon said cause, nor has said cause been noticed for trial in the manner provided for by Rule 22 of the court.

"2. The amended Bill of Complaint, hereinafter referred to as 'said Complaint,' seeks:

"A. to have certain agreements, practices and actions relating to interchange energy declared fraudulent and void as to Commonwealth Edison Company;

"B. to have certain payments by said Edison Company on account of demand charges, deficiency in reserve capacity and allotment of generating station assignments declared a wrongful diversion and misappropriation of the funds of said Edison Company;

"C. an accounting of all such transactions and payments, and decree for repayment of all sums so improperly diverted and misappropriated;

"D. restraint of payments by said Edison Company under the agreements so complained of;

"E. restraint of action against said Edison Company to enforce payments required under the agreements so complained of.

"3. Said Complaint was filed by the complainants on behalf of themselves and of such other stockholders of said Edison Company as might desire to join therein as complainants and bear their share of the expense of the litigation.

"4. In and by said Complaint it was charged that millions of dollars had been wrongfully diverted and misappropriated from said Edison Company in the manner set out at length in said Complaint. A continuance of the fraudulent and illegal agreements, practices and actions so complained of has already resulted, and will continue to result in the loss of many millions of dollars to said Edison Company, and the value of shares of the capital stock of said Edison Company has been, and will be, materially affected by the wrongful diversion and misappropriation of said Edison Company's Funds already accomplished as aforesaid and hereafter to be accomplished unless such diversion and misappropriation be restrained by the decree of this court.

"5. Your Petitioner is informed and believes that there are held by about 61,000 shareholders approximately 1,600,000 shares of the capital stock of said Edison Company. Because of the nature of the charges made in the Complaint, the magnitude of the diversion and misappropriation of funds there charged, the large number of shares of Edison Company stock outstanding, and the large number of holders thereof, each of whom will gain or lose by the direct legal

stock in the Edison Company, presented to the trial court the

following "Petition for Leave to Intervene" in the cause:

"Your petitioner, Edward A. Leslie, respectfully shows:

"1. The original Bill of Complaint in the above entitled and numbered cause was filed on December 13, 1935. By leave of court, an amended Bill of Complaint was filed June 17, 1936, and all defendants put in their answers to said amended Bill of Complaint on October 14, 1936. On May 14, 1936, an order was entered by the court directing that all proceedings thereafter had therein be governed by the Civil Practice Act. As far as can be ascertained from the records of the court, no hearing has been had upon said cause, nor has said cause been noticed for trial in the manner provided for by Rule 82 of the court.

"2. The amended Bill of Complaint, heretofore referred to as 'said Complaint,' reads:

"A. to have certain demands, practices and actions relating to interchange energy declared fraudulent and void as to Commonwealth Edison Company;

"B. to have certain payments by said Edison Company on account of demand charges, deficiency in reserve capacity and allotment of generating station assignments declared a wrongful diversion and misappropriation of the funds of said Edison Company;

"C. an accounting of all such transactions and payments, and decree for repayment of all sums so improperly diverted and misappropriated;

"D. restraint of payments by said Edison Company under the agreements so complained of;

"E. restraint of action against said Edison Company to enforce payments required under the agreements so complained of.

"8. Said Complaint was filed by the complainants on behalf of themselves and of each other stockholders of said Edison Company as might desire to join therein as complainants and bear their share of the expense of the litigation.

"4. In and by said Complaint it was charged that millions of dollars had been wrongfully diverted and misappropriated from said Edison Company in the manner set out at length in said Complaint. A continuance of the fraudulent and illegal agreements, practices and actions so complained of has already resulted, and will continue to result in the loss of many millions of dollars to said Edison Company, and the value of shares of the capital stock of said Edison Company has been, and will be, materially affected by the wrongfully diverted and misappropriation of said Edison Company's funds already accomplished as aforesaid and hereafter to be accomplished unless such diversion and misappropriation be restrained by the decree of this court.

"5. Your petitioner is informed and believes that there are held by about 61,000 shareholders approximately 1,600,000 shares of the capital stock of said Edison Company. Because of the nature of the charges made in the Complaint, the majority of the directors and misappropriation of funds there charged, the large number of shares of Edison Company stock outstanding, and the large number of holders thereof, each of whom will gain or lose by the direct legal

operation of any decree to be entered herein, it is of vital importance that these proceedings be brought to hearing promptly and that such of the shareholders of Edison Company as so desire be enabled to participate therein.

"6. Your Petitioner, Edward A. Leslie, is the owner and holder of record of ten (10) shares of the capital stock of said Edison Company and as such is directly and vitally interested in the conduct and outcome of the proceedings herein.

"7. Your Petitioner does not now, nor has he heretofore approved or acquiesced in the acts and doings complained of in said Complaint.

"8. Your Petitioner desires to join as a complainant in this proceeding and is willing to bear his pro-rata share of the expense of the litigation taxable against the complainants therein.

"9. Your Petitioner is desirous of being represented in these proceedings by Milton G. Manasse, an attorney duly licensed to practice in Illinois.

"Your Petitioner therefore respectfully prays:

"A. That he may be permitted to intervene in this proceeding and be joined as a complainant therein.

"B. That the amended Complaint herein stand as a complaint on behalf of your Petitioner as such additional complainant, and that this petition stand as a supplement thereto.

"C. That all parties defendant be required to answer this petition as such supplement to the amended Complaint herein, or, in the alternative, that the answers of said defendants to said amended Complaint stand as answers to this petition as a supplement to said amended Complaint.

"D. That Milton G. Manasse be permitted to file his appearance as additional counsel for complainants herein, on behalf of your petitioner.

"Respectfully submitted,
"Edward A. Leslie
"Petitioner

"Milton G. Manasse
"Solicitor for Petitioner"

The trial court, on September 21, 1936, denied the motion of Leslie for leave to file his petition upon the ground "that the bill of complaint herein as amended is filed on behalf of all stockholders of Commonwealth Edison Company and that in and by said petition for leave to intervene said Edward A. Leslie asks for no other or further relief than is sought in and by said bill of complaint as amended." Leslie appeals from that order.

Appellant contends that he was entitled to intervene and join as a complainant and that the trial court erred in entering

operation of any decree to be entered herein, it is of vital importance that these proceedings be brought to hearing promptly and that each of the shareholders of Edison Company be enabled to participate therein.

"6. Your Petitioner, Edward A. Leslie, is the owner and holder of record of ten (10) shares of the capital stock of said Edison Company and as such is directly and vitally interested in the conduct and outcome of the proceedings herein.

"7. Your Petitioner does not now, nor has he heretofore approved or acquiesced in the acts and things complained of in said Complaint.

"8. Your Petitioner desires to join as a complainant in this proceeding and is willing to bear his pro-rata share of the expense of the litigation herein against the complainants therein.

"9. Your Petitioner is desirous of being represented in these proceedings by Milton G. Manasse, an attorney duly licensed to practice in Illinois.

"Your Petitioner therefore respectfully prays:

"A. That he may be permitted to intervene in this proceeding and be joined as a complainant therein.

"B. That the amended Complaint herein stand as a complaint on behalf of your Petitioner as such additional complainant, and that this petition stand as a supplement thereto.

"C. That all parties defendant be required to answer this petition as such supplement to the amended Complaint herein, or, in the alternative, that the answers of said defendants to said amended Complaint stand as answers to this petition as a supplement to said amended Complaint.

"D. That Milton G. Manasse be permitted to file his appearance as additional counsel for complainants herein, on behalf of your Petitioner.

"Respectfully submitted,
"Edward A. Leslie
"Petitioner

"Milton G. Manasse
"Solicitor for Petitioner"

The trial court, on September 21, 1930, denied the motion of Leslie for leave to file his petition upon the ground "that the bill of complaint herein as amended is filed on behalf of all stockholders of Common stock in Edison Company and that in and by said petition for leave to intervene said Edward A. Leslie asks for no other or further relief than is sought in and by said bill of complaint as amended." Leslie objects from that order. Appellant contends that he was entitled to intervene and join as a complainant and that the trial court erred in entering

the order in question. There is no merit in this appeal. The settled rule of law in this state is that intervention is a matter within the sound discretion of the trial court and we certainly cannot hold, under the instant record, that the trial court abused its discretion in denying appellant's motion. Appellant concedes "that no further or other relief as against the defendants was sought by the petition for intervention than is prayed for by the amended bill of complaint." He further concedes that his petition does not charge collusion between the parties and does not set up any facts which would warrant the conclusion that the stockholders of the Edison Company were not fairly, honestly and adequately represented by complainants and their attorneys. Appellant owned ten shares in the Edison Company and there were approximately 1,600,000 shares outstanding at the time of the filing of his petition, so that the interest that he would have in any recovery which might be had in this cause for the benefit of the corporation would be practically negligible. Appellant argues that the amended bill invited other stockholders of the Edison Company to join as complainants and therefore appellant had the right to accept the invitation to become an additional complainant. The bill invited other stockholders of the Company to join as complainants provided they would "bear their share of the expense of this litigation." Appellant, in his petition, merely offered to "bear his pro rata share of the expense of the litigation taxable against the complainants."

The order of the Superior court of Cook county of September 21, 1936, is affirmed.

ORDER OF SEPTEMBER 21, 1936, AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

the order in question. There is no merit in this appeal. The settled rule of law in this case is that intervention is a matter within the sound discretion of the trial court and we certainly cannot hold, under the instant record, that the trial court abused its discretion in denying appellant's motion. Appellant concedes that no further or other relief is available against the defendants as sought by the petition for intervention than is prayed for by the amended bill of complaint. He further concedes that his petition does not charge collusion between the parties and does not set up any facts which would warrant the conclusion that the stockholders of the Edison Company were not fairly, honestly and adequately represented by complainants and their attorneys. Appellant owned ten shares in the Edison Company and there were approximately 1,000,000 shares outstanding at the time of the filing of his petition, so that the interest that he would have in any recovery which might be had in this cause for the benefit of the corporation would be proportionally negligible. Appellant argues that the amended bill invited other stockholders of the Edison Company to join as complainants and therefore appellant has the right to accept the invitation to become an additional complainant. The bill invited other stockholders of the Company to join as complainants provided they would "bear their share of the expense of this litigation." Appellant, in his petition, merely offered to "bear his pro rata share of the expense of the litigation parade against the complainants."

The order of the Superior court of Cook county of September 21, 1938, is affirmed.

COURT OF APPEALS, 1939, 1940.

Wright, P. J., and Sullivan, J., concur.

39426

SIXTY-FIRST AND CALUMET APARTMENTS,
INC.,

Appellee,

v.

JOSEPH WOO and CHARLES LEE,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

291 I.A. 607⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On July 22, 1936, Sixty-First and Calumet Apartments, Inc., appellee (hereinafter called plaintiff), filed its statement ^{of claim} ~~ina~~ forcible detainer suit, in which it alleged that it was entitled to the possession of Apartment #2-A at 6109 Calumet avenue, Chicago, Illinois, together with all appurtenances thereto. Joseph Woo and Charles Lee, appellants (hereinafter called defendants), were personally served with summons on July 23, 1936. Defendants concede that when the case was called for trial, on July 28, 1936, they failed to appear, and a judgment was then entered that plaintiff have and recover from defendants the possession of the premises and that a writ of restitution issue therefor. On September 21, 1936, defendants filed a petition in the nature of a writ of error coram nobis, verified by Woo, defendant, which alleges that on July 15, 1936, a landlord's five days' notice was served upon them; that on July 22, 1936, a suit for possession was instituted against them for the possession of the premises located at 6109 Calumet Avenue, Chicago, Illinois, in the name of the 61st and Calumet Apartments, Inc., case Number 3500649; that the five days' notice was served by Selz and Southman Inc., real estate agents of plaintiff; that said suit was signed by the law firm of Davis & St. George, and sworn to by one Mitchel P. Davis; that when the "petitioners" were served

EXHIBIT AND COURT REPORTS
1932

Appellee

v.

JOSEPH WOO and CHARLES LEE
Appellants

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF ILLINOIS

IN CHARGE OF CLERK

3211A.607

MR. JUSTICE SUGARMAN DELIVERED THE OPINION OF THE COURT.

On July 22, 1936, sixty-first and Chicago Apartments, Inc., appellee (hereinafter called plaintiff), filed its statement of claim for the possession of the premises located at 4109 Calumet Avenue, Chicago, Illinois, together with all appurtenances thereto. Joseph W. and Charles L. Lee, appellants (hereinafter called defendants), were personally served with summons on July 23, 1936. Defendants counterclaimed with summons on July 23, 1936, and filed for trial. On July 23, 1936, they failed to appear, and a judgment was then entered that plaintiff have and recover from defendants the possession of the premises and that a writ of replevin issue therefor. On September 21, 1936, defendants filed a petition in the nature of a writ of error coram nobis, verified by two defendants, which alleges that on July 15, 1936, a judgment five days' notice was served upon them; that on July 22, 1936, a writ for possession was instituted against them for the possession of the premises located at 4109 Calumet Avenue, Chicago, Illinois, in the name of the first and second defendants, Inc., case number 3200449; that the five days' notice was served by Gels and Southman Inc., real estate agents of plaintiff; that said writ was signed by the law firm of Davis & St. George, and known to by one Mitchell P. Davis; that when the "petitioners" were served

with summons in the forcible detainer suit, Woo appeared at the office of Selz and Southman Inc., from whom defendants had rented the apartment, "showed the summons he had received to a young man who is ⁱⁿ the employ of the real estate agents, Selz and Southman Inc., stating that he did not owe any rent and held a receipt for rent paid up to and including July 25, 1936, and was told by the young man in the office that an error had been made and that he need not appear in court on the day set, namely July 28, 1936, and that the matter would be taken care of; *** that not regarding the fact that no rent was due, a judgment was entered in said cause and that on August 4, 1936, a writ of restitution *** was issued out of this court, and by virtue of said writ the bailiff of the Municipal Court of Chicago, by his deputies, appeared at the premises occupied by your petitioners, forced an entrance through a window, awakened your petitioners, Charles Lee, who was asleep in the said apartment and removed all of the goods and chattels belonging to your petitioners, with great force and violence, and placed them in the street; *** that on July 7, 1936, they had paid their rent for the month of July 1936, up to and including July 25, 1936 at the office of the real estate agents Selz & Southman Inc., and hold their receipt therefor, copy of which is hereto attached and made a part hereof, the original of which will be produced in court upon a hearing of this petition. Your petitioners further represent *** that they did not owe any rent on the day the landlord's five day notice was served upon them, nor did they owe any rent on the date the said summons was served upon them, on July 23, 1936; *** that on August 7, 1936, Joseph Woo appeared at the office of the agents, Selz & Southman Inc. and tendered his August rent for said premises in the sum of \$27.50, which was refused, but that no notification or information was given him of any court proceedings, as set out above, were pending, and had not taken care of by them, the said agents, Selz & Southman Inc. or that judgment had been entered thereon. Your petitioners

man Inc. or that judgment had been entered thereon. Your petitioners
 ing, and had not taken care of by them, the said agents, Seitz & South-
 was given him of any court proceedings, as set out above, were hand-
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 said summons was served upon them, on July 23, 1936; *** that on August
 notice was served upon them, nor did they owe any rent on the date the
 *** that they did not owe any rent on the day the landlord's five day
 upon a hearing of this petition. Your petitioners further represent
 and made a part hereof, the original of which will be produced in court
 Inc., and held their receipt therefor, copy of which is hereto attached
 July 23, 1936 at the office of the real estate agents Seitz & Southman
 had paid their rent for the month of July 1936, up to and including
 fence, and placed them in the street; *** that on July 7, 1936, they
 and chattels belonging to your petitioners, with great force and vio-
 Lee, who was asleep in the said apartment and removed all of the goods
 forced an entrance through a window, awakened your petitioners, Charles
 his agents, appeared at the premises occupied by your petitioners,
 virtue of said writ the bailiff of the Municipal Court of Chicago, by
 1936, a writ of restitution *** was issued out of this court, and by
 was due, a judgment was entered in said cause and that on August 4,
 would be taken care of; *** that not regarding the fact that no rent
 in court on the day set, namely July 23, 1936, and that the matter
 the office that an error had been made and that he need not appear
 up to and including July 23, 1936, and was told by the young man in
 stating that he did not owe any rent and held a receipt for rent paid
 who is ⁱⁿ the employ of the real estate agents, Seitz and Southman Inc.,
 the apartment," showed the summons he had received to a young man
 office of Seitz and Southman Inc., from whom defendants had rented
 with summons in the forcible detainer suit, who appeared at the

now invoke the jurisdiction of this court, conferred on it under section 72 of the New Practice Act by this petition in the nature of a writ of error coram nobis, on the following grounds: 1: That no rent was due the said plaintiff 61st and Calumet Apartments, Inc. on July 15, 1936, when the landlord's five day notice was served upon them. 2: That no rent was due the plaintiff on July 23, 1936 when judgment was entered on the forcible detainer suit filed herein. 3: That relying on the fact that they owed no rent at the time they were served with summons in the action of forcible detainer they relied on the representation of the agent, Selz & Southman Inc. and did not appear in court in response to said summons and were guilty of no negligence as a matter of fact. 4: That the fact that they owed no rent at the time judgment for possession was entered was unknown to the trial judge at the time of the entry of the judgment, which fact, if known to the court would have prevented it from entering the judgment for possession. Wherefore under the powers conferred on this court by Section 89 of the Practice Act of this State, your petitioners pray that the finding, judgment and order for a writ of restitution and the writ of restitution issued herein be vacated and set aside and held for naught, a new trial ordered by this court and a hearing may be had on the matters and things; that all errors of fact may be corrected and justice done." Plaintiff's motion to dismiss the petition was allowed and defendants have appealed from the order dismissing their petition.

Defendants contend that the court erred in dismissing their petition because "from an examination of this petition it will be noted that it had a tendency to charge that by certain false and fraudulent representations of the appellee-plaintiff to the defendants, through its agents, the petitioners were induced to remain away from court on the day of the trial of this cause, thereby suffering a default judgment for possession and costs to be rendered against

now invoke the jurisdiction of this court, conferred on it under section 72 of the New Practice Act by this petition in the nature of a writ of error coram nobis, on the following grounds: 1: That no rent was due the said plaintiff Elst and Calumet Apartments, Inc. on July 15, 1936, when the landlord's five day notice was served upon them. 2: That no rent was due the plaintiff on July 22, 1936 when judgment was entered on the forcible detainer suit filed herein. 3: That relying on the fact that they owed no rent at the time they were served with summons in the action of forcible detainer they relied on the representation of the agent, Seis & Southman Inc. and did not appear in court in response to said summons and were guilty of no negligence as a matter of fact. 4: That the fact that they owed no rent at the time judgment for possession was entered was unknown to the trial judge at the time of the entry of the judgment, which fact it known to the court would have prevented it from entering the judgment for possession. Herefore under the powers conferred on this court by Section 69 of the Practice Act of this State, your petitioners pray that the findings, judgment and order for a writ of restitution and the writ of restitution issued herein be vacated and set aside and held for nought, a new trial ordered by this court and a hearing may be had on the matters and things that all errors of fact may be corrected and justice done." Plaintiff's motion to dismiss the petition was allowed and defendants have appeared from the order dismissing their petition.

Defendants contend that the court erred in dismissing their petition because "from an examination of this petition it will be noted that it had a tendency to charge that by certain false and fraudulent representations of the appellee-plaintiff to the court and-ants, through its agents, the petitioners were induced to remain away from court on the day of the trial of this cause, thereby suffering a default judgment for possession and costs to be rendered against

them, without an opportunity to be heard." Defendants concede that the writ will not be used to aid a party's own negligence (see McCord v. Briggs & Turivas, 338 Ill. 158, 167, and Cramer v. Commercial Men's Association, 260 Ill. 516), but they argue that the petition makes out a prima facie showing that they were not negligent in protecting their rights.

Plaintiff raises three points in support of its contention that the judgment should be affirmed. We need notice but one, viz., "The writ will not be used to aid a party's own negligence." This contention must be sustained. The petition recites that the bailiff, on August 4, 1936, by virtue of the writ of restitution that issued out of the court, "appeared at the premises occupied by your petitioners, forced an entrance through a window, awakened your petitioners, Charles Lee, who was asleep in the said apartment and removed all of the goods and chattels belonging to your petitioners, with great force and violence, and placed them in the street." This alleged action of the bailiff took place seven days after the date of the entry of the judgment and at a time when twenty-three days of the thirty days' period provided by the statute in which the judgment and the default of the defendants might have been set aside, still remained, yet defendants failed to take advantage of the statutory provision. The instant petition was not filed until September 21, 1936, and no facts are set up in it ^{to} explain the delay. As our Supreme court has repeatedly said, a petition in the nature of error coram nobis is not intended to relieve a party from his own mistake or negligence.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

them, without an opportunity to be heard." The court's decision that the writ will not be used to aid a party's own negligence (see McLeod v. Briggs & Turville, 338 Ill. 122, 127, and Graham v. Commercial Men's Association, 360 Ill. 516), but they argue that the petition makes out a prima facie showing that they were not negligent in protecting their rights.

Plaintiff raises three points in support of its contention that the judgment should be affirmed. The first is that the writ will not be used to aid a party's own negligence. This contention must be sustained. The petition recites that the bailiff, on August 4, 1936, by virtue of the writ of restitution that issued out of the court, "appeared at the premises occupied by your petitioners, forced an entrance through a window, awakened your petitioners, Charles Lee, who was asleep in the said apartment and removed all of the goods and chattels belonging to your petitioners, with great force and violence, and placed them in the street." This alleged action of the bailiff took place seven days after the date of the entry of the judgment and at a time when twenty-three days of the thirty days' period provided by the statute in which the judgment and the return of the defendant might have been set aside, still remained, yet defendant failed to take advantage of the statutory provision. The instant petition was not filed until September 21, 1936, and no facts are set up in it to explain the delay. As our Supreme Court has repeatedly said, a petition in the nature of error coram nobis is not intended to relieve a party from his own mistake or negligence.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

39434

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

STEVE GODA,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

291 I.A. 608¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The People of the State of Illinois are here asking to have reviewed a judgment of the Municipal court of Chicago entered December 24, 1936.

On December 3, 1936, an information was filed against defendant, Steve Goda, charging that on December 1, 1936, in the City of Chicago, County of Cook, and State of Illinois, he "did steal take and carry away one Pay check made out to Rex Martin," contrary to the Statute, etc. On December 3, 1936, there was entered, by Judge Edelman, a judgment in the cause, which contains, inter alia, the following:

"Defendant arraigned pleads guilty in manner and form as charged in the information, and the Court having fully advised the defendant of his legal rights and explained the consequences of entering his plea of guilty, including his right to a jury trial and extent of penalty, and the defendant persisting in said plea of guilty, the said plea of guilty is received and recorded and the Court examined witnesses as to aggravation and mitigation of said offense. Value of property Eight Dollars.

"The State's Attorney now here moves the Court for final judgment on the plea of guilty herein, said people being represented here by the State's Attorney and said defendant being present in his own proper person as well as represented by counsel, and not saying anything further why the judgment of the court should not now be pronounced against him on the plea of guilty entered in this cause, the Court finds that it has jurisdiction of the subject matter of this cause and of the parties hereto, and it is considered and adjudged by the court that said defendant is guilty of the criminal offense of steal take and carry away one check value of Eight Dollars on said plea of guilty."

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

STEVE GODA,
Appellee.

ALLIANCE MUNICIPAL
COURT OF CHICAGO.

321 I.A. 608

MR. JUSTICE SCAMMEL DELIVERED THE OPINION OF THE COURT.

The People of the State of Illinois are here asking to have reviewed a judgment of the Municipal Court of Chicago entered December 24, 1936.

On December 2, 1936, an information was filed against defendant, Steve Goda, charging that on December 1, 1936, in the City of Chicago, County of Cook, and State of Illinois, he "did steal take and carry away one Ray clock made out to Rex Martin," contrary to the Statute, etc. On December 2, 1936, there was entered, by Judge Weisman, a judgment in the cause, which contained, inter alia, the following:

"Defendant arrested pleads guilty in manner and form as charged in the information, and the Court having fully advised the defendant of his legal rights and explained the consequences of entering his plea of guilty, including his right to a jury trial and extent of penalty, and the defendant persisting in said plea of guilty, the said plea of guilty is received and recorded and the Court examined witnesses as to aggravation and mitigation of said offense. Value of property about \$10.00."

"The State's attorney now moves the Court for final judgment on the plea of guilty herein, said people being represented here by the State's attorney and said defendant being present in his own proper person as well as represented by counsel, and not saying anything further why the judgment of the Court should not now be pronounced against him on the plea of guilty entered in this cause, the Court finds that it has jurisdiction of the subject matter of this cause and of the parties hereto, and it is considered and adjudged by the Court that said defendant is guilty of the criminal offense of steal take and carry away one clock value of \$10.00. Dollars on said plea of guilty."

The judgment also shows the sentence, viz., that defendant be confined at labor in the House of Correction of the City of Chicago for the term of ninety days, and to pay a fine of one dollar. Defendant was committed to the House of Correction and after he had served twenty-two days of the sentence and while he was still confined there a verified "petition in the nature of a writ of error coram nobis" was filed in said court on December 23, 1936. The petition, omitting the formal parts, alleges:

"Your petitioner further respectfully represents unto your Honor that he was arrested at the time without any warning whatsoever and without any warrant issued against him and was not released upon bail, nor did he have any opportunity to employ counsel to properly prepare his defense before he was tried upon the charge offered against him.

"Your petitioner respectfully represents unto your Honor that he is absolutely innocent of the charge placed against him and upon which he was found guilty."

On the same date Judge Edelman entered an order "that defendant Steve Goda be brought from the House of Correction before Branch Court No. 16 located at Room 1114 City Hall, Chicago, Illinois, at 9:30 o'clock A. M. on the 24th day of December 1936 to appear at a hearing on a petition for a new trial under Section 72 of the Civil Practice Act." At the same time Judge Edelman entered an order upon the Superintendent of the House of Correction to produce the defendant in court on December 24, 1936, at 9:30 a. m., upon a hearing "upon the verified petition of the defendant, Steve Goda, in support of their motion for a correction of errors that intervened in the trial and proceedings had before this Court on December 3, 1936." On the same day the state's attorney filed a motion to dismiss defendant's petition upon a number of grounds. We need mention but four: (a) That the petition was insufficient as it did not state facts, but mere conclusions. (b) That no facts are alleged to show that defendant was prevented from presenting his defense by duress, fraud, excusable mistake or ignorance. (c) That the petition does not allege facts from which it could be in-

The judgment also shows the sentence, viz., that defendant be confined at labor in the House of Correction of the City of Chicago for the term of ninety days, and to pay a fine of one dollar. Defendant was committed to the House of Correction and after he had served twenty-two days of the sentence and while he was still confined there a verified "petition in the nature of a writ of error coram nobis" was filed in said court on December 23, 1936. The petition, omitting

the formal parts, alleges:

"Your petitioner further respectfully represents unto your Honor that he was arrested at the time without any warning whatsoever and without any warrant issued against him and was not released upon bail, nor did he have any opportunity to employ counsel to properly prepare his defense before he was tried upon the charge offered against him.

"Your petitioner respectfully represents unto your Honor that he is absolutely innocent of the charge placed against him and upon which he was found guilty."

On the same date Judge Abelman entered an order "that defendant Steve Gode be brought from the House of Correction before Branch Court No. 16 located at Room 1114 City Hall, Chicago, Illinois, at 9:30 o'clock A. M. on the 14th day of December 1936 to appear at a hearing on a petition for a new trial under section 72 of the Civil Practice Act." At the same time Judge Abelman entered an order upon the undersigned clerk of the House of Correction to produce the defendant in court on December 24, 1936, at 9:30 A. M., upon a hearing upon the verified petition of the defendant, Steve Gode, in support of their motion for a correction of errors that intervened in the trial and proceedings had before this Court on December 3, 1936." On the same day the state's attorney filed a motion to dismiss defendant's petition upon a number of grounds. We need mention but four: (a) That the petition was insufficient as it did not state facts, but mere conclusions. (b) That no facts are alleged to show that defendant was prevented from presenting his defense by duress, fraud, excusable mistake or ignorance. (c) That the petition does not allege facts from which it could be in-

ferred that the testimony of new witnesses upon another hearing would show that he was not guilty of the charge. (d) That the alleged facts are insufficient to give the court jurisdiction in the cause. Upon the filing of the petition Judge Edelman immediately "overruled" it, and, over the objection of the state's attorney, entered an order discharging defendant. The People have appealed from that order. Defendant has not seen fit to file an appearance nor a brief in this court.

The state's attorney is fully justified in contending that the alleged petition under section 72 of the Practice act was a patent subterfuge intended to give the trial court an appearance of jurisdiction. Defendant, at the time the petition was filed, was serving his sentence, and the trial court had no power to entertain a motion for a new trial and to vacate or set aside its judgment. (See People v. Nakielny, 279 Ill. App. 387, 394.) Hence the necessity for the pretended proceedings under section 72. The office of the writ of error coram nobis is so well understood that it is entirely unnecessary to cite the many cases in which our Supreme court has stated the purposes of the writ. The petition must state facts, not mere conclusions, and must make out a prima facie showing that there was some fact unknown to the court at the time the judgment was rendered which would have precluded the rendition of the judgment had it been within the knowledge of the court at the time of the entry of the judgment. The judgment order entered by Judge Edelman December 3, 1936, recites that defendant was represented by counsel. In People v. Parcora, 358 Ill. 448, the court stated (p. 451):

"It is a matter of common knowledge that in a court such as the municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the municipal court did not deny a request for the services of counsel."

formed that the testimony of new witnesses upon another hearing would show that he was not guilty of the charge. (4) That the alleged facts are insufficient to give the court jurisdiction in the case. Upon the filing of the petition Judge Abolman immediately "overruled" it, and, over the objection of the state's attorney, entered an order discharging the defendant. The people have appealed from that order. Defendant has not been left to life and limb as he was for a brief in this court.

The state's attorney is fully justified in contending that the alleged petition under section 73 of the Criminal Code was a patent error intended to give the trial court an appearance of jurisdiction. Defendant, at the time the petition was filed, was serving his sentence, and the trial court had no power to entertain a motion for a new trial and to vacate or set aside its judgment. (See People v. Haskins, 229 Ill. App. 387, 394.) Hence the necessity for the pretended proceedings under section 73. The office of the writ of error coram nobis is so well understood that it is entirely unnecessary to cite the many cases in which our supreme court has stated the purpose of the writ. The petition must state facts, not mere conclusions, and must make out a prima facie showing that there was some fact unknown to the court at the time the judgment was rendered which would have resulted in the rendition of the judgment had it been within the knowledge of the court at the time of the entry of the judgment. The judgment order entered by Judge Abolman December 3, 1934, recites that defendant was represented by counsel. In People v. Haskins, 228 Ill. App. 443, the court stated (p. 451):

"It is a matter of common knowledge that in a court which the municipal court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a writ of error showing to the contrary, this court must presume that the judge hearing this case in the municipal court did not deny a right for the services of counsel."

In the instant case, assuming that defendant has a right to contradict the record, nevertheless, the trial court deprived the People of an opportunity to show that defendant was represented by counsel, or that he did not desire one. In any event, Judge Edelman knew whether or not defendant was represented by counsel at the time of the trial. After the trial court had overruled the motion to dismiss the petition, the People should have been ruled to plead, and if they failed to comply with the rule default could then have been entered against them. (See People v. Nakielny, supra, 396.) No rule to plead, no default, was entered. Until a default was entered against the People no proper judgment could be entered in the cause. None of the rules of procedure necessary in a proceeding under section 72 were followed by the trial court. Even if the petition were not vulnerable and if the correct procedure had been followed, the only judgment that could have been properly entered was one vacating the judgment of December 3, 1936. The order of discharge entered by Judge Edelman was a usurpation of judicial power. It is significant that the petitioner, in his petition, did not ask to be discharged. The petition was so defective that it failed to make out a prima facie case under section 72, and the motion to dismiss should have been sustained.

The judgment order of the Municipal court of Chicago entered December 24, 1936, is reversed, and the state's attorney should immediately take proper steps to bring about the recommitment of defendant under the judgment of December 3, 1936.

JUDGMENT ORDER OF DECEMBER 24, 1936, REVERSED.

Friend, P. J., and Sullivan, J., concur.

In the instant case, assuming that defendant has a right to con-
tradict the record, nevertheless, the trial court deprived the
People of an opportunity to show that defendant was represented
by counsel, or that he did not desire one. In any event, Judge
Abelmann knew whether or not defendant was represented by counsel
at the time of the trial. After the trial court had overruled
the motion to dismiss the petition, the people should have been
ruled to plead, and if they failed to comply with the rule defendant
could then have been entered against them. (See People v. Aklelany,
supra, 396.) No rule to plead, no default, was entered. Until a de-
fault was entered against the people no proper judgment could be
entered in the cause. None of the rules of procedure necessary in a
proceeding under section 78 were followed by the trial court. Even
if the petition were not vulnerable and if the correct procedure had
been followed, the only judgment that could have been properly entered
was one vacating the judgment of December 3, 1936. The order of dis-
charge entered by Judge Abelmann was a usurpation of judicial power.
It is significant that the petitioner, in his petition, did not ask
to be discharged. The petition was so defective that it failed to
make out a prima facie case under section 78, and the motion to dis-
miss should have been sustained.
The judgment order of the Municipal Court of Chicago entered
December 24, 1936, is reversed, and the state's attorney would have
later take proper steps to bring about the commitment of defendant
under the judgment of December 3, 1936.
TO CERTIFY ORDER OF DECEMBER 24, 1936, REVERSED.

Friend, F. J., and Sullivan, J., concur.

39446

FREDERICK A. WILSON,
Appellee,

v.

HENRY B. KILGOUR,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

291 I.A. 608²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in assumpsit brought to recover a real estate broker's commission and interest. A verdict was returned in favor of plaintiff in the sum of \$6,250 plus interest at five per cent per annum from the date of the sale of the property.

Judgment was entered in favor of plaintiff and against defendant in the sum of \$8,869.78. Defendant appeals.

The record in this case is an unusual one. The declaration was filed in 1926. In a trial before Judge Pomeroy and a jury a verdict was returned for plaintiff, assessing his damages at the sum of \$3,125. Defendant's motion for a new trial was allowed by the trial court. The case was again tried, before Judge Klarkowski and a jury, and a verdict was returned for plaintiff, assessing his damages at \$8,968.50. Defendant's motion for a new trial was allowed by the trial court. The case was next tried before Judge Caverly and a jury, and at the conclusion of all of the evidence the court, upon motion of defendant, directed the jury to find a verdict for the defendant. Judgment was entered upon the verdict and plaintiff appealed. We held (Wilson v. Kilgour, 266 Ill. App. 615, abstract opinion) that the trial court in directing a verdict had passed upon the weight of the evidence

30446

WILLIAM A. LILSON,
Appellee,

v.

HENRY B. KILGOUR,
Appellant.

800 I.A. 608

MR. JUSTICE SCHEMIDT DELIVERED THE OPINION OF THE COURT.

An action in assumpsit brought to recover a real estate broker's commission and interest. A verdict was returned in favor of plaintiff in the sum of \$6,350 plus interest at five per cent per annum from the date of the sale of the property. Judgment was entered in favor of plaintiff and against defendant in the sum of \$8,869.78. Defendant appeals.

The record in this case is an unusual one. The decision was filed in 1926. In a trial before Judge Hammer and a jury a verdict was returned for plaintiff, assessing his damages at the sum of \$6,125. Defendant's motion for a new trial was allowed by the trial court. The case was again tried, before Judge Karkowski and a jury, and a verdict was returned for plaintiff, assessing his damages at \$8,925.50. Defendant's motion for a new trial was allowed by the trial court. The case was next tried before Judge Caverly and a jury, and at the conclusion of all of the evidence the court, upon motion of defendant, directed the jury to find a verdict for the defendant. Judgment was entered upon the verdict and plaintiff appealed. We held (Lilson v. Kilgour, 266 Ill. App. 615, abstract opinion) that the trial court in directing a verdict had passed upon the weight of the evidence

and we quoted from the record the following language used by the trial court in passing upon the motion: "You see, it is the duty of the plaintiff to make out a case by a preponderance or greater weight of the evidence. He hasn't done that. * * * I don't care about the circumstances. You walk into a man's home and talk about it, and a policeman at the corner saw him come there and saw him come out. Then he makes a statement he told me to do thus and so, and the other man denies it. Are you going to let a verdict like that stand? * * * That man should be made to prove his case by a preponderance or greater weight of the evidence. They ought to get something in writing; the naked evidence of one man against another in this court isn't sufficient. I am not going to let that testimony stand. He hasn't a witness but this man himself. He tells a story that fits his own case. He may be telling the truth, I don't know; the other man may be telling the truth. The burden is on the plaintiff to make out his case by a preponderance of the evidence. Has he done it? No. I will direct a verdict here and now; and you can take it up." We held that there was evidence in the record tending to prove plaintiff's cause of action, that the action of the trial court in directing a verdict for defendant was a violation of plaintiff's constitutional right to a trial by jury, and we reversed the judgment and remanded the cause for a new trial. As Judge Pomeroy, and also Judge Klarkowski, allowed the case to go to the jury, it is likely that each granted the motion for a new trial upon the ground that plaintiff had failed to prove his case by a preponderance of the evidence. The case was again tried, before Judge Trude and a jury, and a verdict was returned in favor of plaintiff in the sum of \$8,687.50. Judgment was entered upon the verdict and defendant appealed. In this court defendant contended that the verdict of the jury was contrary to the manifest weight of the evidence, but we held

and we quoted from the record the following language used by the
trial court in passing upon the motion: "You see, it is the duty
of the plaintiff to make out a case by a preponderance or greater
weight of the evidence. He hasn't done that. * * * I don't care
about the circumstances. You walk into a man's home and talk about
it, and a policeman at the corner saw him come there and saw him
come out. Then he makes a statement he told me to do this and do
that and the other man denies it. Are you going to let a verdict like
that stand? * * * That man should be made to prove his case by a
preponderance or greater weight of the evidence. They ought to get
something in writing; the naked evidence of one man against another
in this court isn't sufficient. I am not going to let that testimony
stand. He hasn't a witness but this man himself. He tells a story
that fits his own case. He may be telling the truth, I don't know;
the other man may be telling the truth. The burden is on the plaintiff
to make out his case by a preponderance of the evidence. Has he done
it? No. I will direct a verdict here and now; and you can take it
up." He held that there was evidence in the record tending to prove
plaintiff's cause of action, that the action of the trial court in
directing a verdict for defendant was a violation of plaintiff's con-
stitutional right to a trial by jury, and we reversed the judgment
and remanded the case for a new trial. As Judge Remondy, and also
Judge Klamkowski, allowed the case to go to the jury, it is likely
that each granted the motion for a new trial upon the ground that
plaintiff had failed to prove his case by a preponderance of the
evidence. The case was up in trial, before Judge Trane and a jury,
and a verdict was returned in favor of plaintiff in the sum of
\$8,687.50. Judgment was entered upon the verdict and defendant
appeared. In this court defendant contended that the verdict of the
jury was contrary to the manifest weight of the evidence, but we held

that as three juries had found for plaintiff we would not be justified in sustaining the contention. We reversed the judgment and remanded the cause for the sole reason that the trial court gave, of his own motion, an erroneous interrogatory to the jury. We stated that "three juries have found for plaintiff, and it is a matter of regret that we are forced to reverse the instant judgment." The case was then tried before Judge Borders had resulted in the instant verdict and judgment.

Because of certain expressions in several early decisions it is sometimes assumed by trial judges that it is the law of this state that a verdict which rests alone upon the testimony of one party, who is contradicted in toto by another, must be set aside. Such, of course, is not the law. The preponderance of the evidence does not necessarily depend upon the number of witnesses testifying as to any material subject of inquiry. Even though the same number of witnesses testify on each side there may still be a preponderance on one side or the other. While the number of witnesses is a factor that may be taken into consideration in determining where the weight or preponderance of the evidence lies, it is not necessarily determinative, and a jury or the trial court may be fully warranted in finding in favor of a party even if his case is supported by the lesser number of witnesses. It is the province of a jury or the trial court to pass upon the credibility of the witnesses and to determine the weight, if any, that should be attached to their testimony.

"The witness' manner, demeanor and bearing upon the stand, - his replies, whether frank and open or reluctant and evasive, - his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other, - * * * are always of vital importance in determining to what, if any, credit the witness is entitled." (Ill. & St. L. R. R. & C. Co. v. Ogle, 92 Ill. 353, 362.)

It is not the law that a verdict or finding which rests alone upon the testimony of one party who is contradicted in toto by another,

that as three juries had found for plaintiff we could not be justified in sustaining the contention. We reversed the judgment and remanded the cause for the sole reason that the trial court gave, of his own motion, an erroneous instruction to the jury. We stated that "three juries have found for plaintiff, and it is a matter of regret that we are forced to reverse the instant judgment." The case was then tried before Judge Sanders and resulted in the instant verdict and judgment.

Because of certain expressions in several early decisions it is sometimes assumed by trial judges that it is the law of this state that a verdict which rests alone upon the testimony of one party, who is contradicted in toto by another, must be set aside. Such, of course, is not the law. The preponderance of the evidence does not necessarily depend upon the number of witnesses testifying in any material subject of inquiry. Even though the same number of witnesses testify on each side there may still be a preponderance on one side or the other. While the number of witnesses is a factor that may be taken into consideration in determining where the weight of preponderance of the evidence lies, it is not necessarily determinative, and a jury or the trial court may be fully warranted in finding in favor of a party even if his case is supported by the lesser number of witnesses. It is the province of a jury or the trial court to pass upon the credibility of the witnesses and to determine the weight, if any, that should be attached to their testimony.

"The witness' manner, demeanor and bearing upon the stand, - his replies, whether frank and open or reticent and evasive, - his manner of expressing himself, whether modest, dignified and respectful on the one hand, or extravagant, impertinent and reckless on the other, - are always of vital importance in determining to what, if any, credit the witness is entitled." (Ill. & C. L. R. & C. Co. v. City of Chicago, 323 Ill. 382, 383.)

It is not the law that a verdict or finding which rests alone upon the testimony of one party who is contradicted in toto by another,

where both appear to be equally credible, will be set aside upon appeal. (See Eimer v. Miller, 255 Ill. App. 465, 470, and cases cited therein; Shevalier v. Seager, 121 Ill. 564, 570; Hayden v. Miller, 205 Ill. App. 147, 148; Mills & Co. v. Duke, 232 Ill. App. 277, 280.) As stated in this last mentioned case (p. 280):

"Even in a criminal case where the law requires proof of the defendant's guilt beyond a reasonable doubt, a judgment of conviction will not be reversed merely because only the complaining witness testifies to the commission of the crime and he is contradicted by the defendant. The People v. Greenberg, 302 Ill. 566; The People v. Boetcher, 298 Ill. 580; The People v. Maciejewski, 294 Ill. 390." (See also Ryan v. Harty, 200 Ill. App. 470; Rollins v. Kroncke, 262 Ill. App. 648 (Abst.).

In the late case of The People v. Fortino, 356 Ill. 415, 420, the court said:

"This court has frequently held that the testimony of one witness, even though denied by the accused, may be sufficient to sustain a conviction. People v. Schanda, 352 Ill. 36; People v. Zurek, 277 id. 621."

There is now presented upon this appeal a case in which four juries have found for plaintiff. See Norkevich v. Atchison, T & S. F. Ry. Co., 263 Ill. App. 1 (certiorari denied by the Supreme court, 1b. xiv), where the subject of the effect of three verdicts for plaintiff is reviewed at length.

Plaintiff's theory of fact is that he had a contract with defendant to find a purchaser for the sixty acres in question and that pursuant to the contract he produced a purchaser, H. O. Stone & Company, who subsequently bought the tract on terms satisfactory to defendant. Defendant contends that "plaintiff failed to prove performance of his claimed contract with Kilgour." When this cause was before us upon the appeal from the judgment entered by Judge Caverly, we held that there was evidence tending to prove plaintiff's cause of action, and we make the same holding upon the evidence in the instant record.

Defendant admits that "Wilson introduced Stone & Company and that the final deal was made with Stone & Company, and that Kilgour

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Hollins v. Monahan, 268 Ill. App. 643 (App.).

254 Ill. 330." (See also People v. Harty, 257 Ill. App. 474;
The People v. Corbin, 258 Ill. 350; The People v. Johnson,
dicted by the defendant. The People v. Johnson, 258 Ill. 266;

affirms testimony to the commission of the crime and he is con-
conviction will not be reversed merely because only the complaining

the defendant's guilt beyond a reasonable doubt, a judgment of
"Even in a criminal case where the law requires proof of

277, 280.) As stated in this last mentioned case (p. 280):

Miller, 208 Ill. App. 147, 148; Miller & Co. v. Lake, 232 Ill. App.

often therein; Shelton v. Bennett, 121 Ill. 504, 570; Hyman v.

appeal. (See Simur v. Miller, 255 Ill. App. 463, 470, and cases

where both appear to be equally credible, will be set aside upon

got the commission." He contends that the sixty acres was syndicate property; that he could not reduce the final price paid by H. O. Stone & Company; that it was the syndicate manager who accepted the price offered by H. O. Stone & Company and decided that defendant was entitled to the commission in the case. Plaintiff testified that defendant represented himself as the owner of the property. Defendant testified that he had an interest in the property as a member of a syndicate that owned it. He did not testify as to his exact interest in the property. Plaintiff was a real estate broker and it is his theory of fact that defendant employed him to find a purchaser for the property. In 9 C. J. 586, the author states:

"One who employs a broker to find a purchaser is usually liable for compensation regardless of the nature of his interest in the property, and regardless of whether or not he has any interest in it whatsoever."

Many cases are cited by the author in support of the text. The fact that a person employing a firm to secure the renewal or extension of a mortgage loan is the owner of only an undivided half of the mortgaged premises and has no authority to contract for the co-owner, does not relieve him of liability for commissions. (H. O. Stone & Co. v. Deahl, 174 Ill. App. 421.) One who, in dealing with an agent in the sale of land, acts as the owner thereof and as the person liable for commission, cannot, in the event of a sale, escape liability for such commission on the ground that he is not in fact the owner. (Imrie v. Wilson, 3 DomLR 826.) To the same effect see Valerius v. Lohring, 87 Nebr. 425; Kennon v. Poerschke, 148 App. Div. 839, 133 N. Y. S. 528; Rounds v. Alee, 116 Iowa 345 (where a husband was held liable to a broker whom he employed to sell his wife's property.) In the instant case defendant claims that he made the sale and that the syndicate paid him the commission for making it. He contends that even if he employed Wilson to find a purchaser, it was at a price stated, and Wilson must show by the evidence that he procured a purchaser willing and able to buy at that

get the commission." He contends that the sixty acres was a right-

estate property; that he could not reduce the final price paid by

H. O. Stone & Company; that it was the syndicate manager who

accepted the price offered by H. O. Stone & Company and decided that

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Iowa 345 (where a husband was held liable to a broker whom he employed

to sell his wife's property). In the instant case defendant claims

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a purchaser, it was at a price stated, and Allison must show by the

evidence that he procured a purchaser willing and able to pay at that

price; that in the instant case plaintiff testified that defendant told him he wanted \$2,500 an acre for the property; that as the sale was made for \$2,083-1/3 per acre, plaintiff did not find a purchaser who was ready, willing and able to buy the sixty acres at \$2,500 per acre and therefore he is not entitled to commission. This contention misinterprets plaintiff's testimony. Indeed, defendant testified, "I didn't tell him that it was around \$2,500 an acre. I never gave him a price. When he came and talked to me about a selling agreement, I did not give him a price. He did not mention a price to me." Plaintiff's testimony is to the effect that he was to find a buyer satisfactory to defendant. He did so and the deal was closed on a basis satisfactory to defendant. The mere fact that in closing the contract the price fixed was somewhat less than \$2,500 an acre does not deprive plaintiff, under the facts, of his commission.

"It is also true, that, where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions." (Hafner v. Herron, 165 Ill. 242, 246-7.)

"The only theory upon which the appellant could possibly recover a commission in this case, according to his own showing, is, that he furnished a purchaser who was able and ready to purchase the farm on the terms upon which it was placed in his hands for sale or upon terms satisfactory to the owner." (Woolf v. Sullivan, 224 Ill. 509, 514.)

"Where an agent is employed to sell real estate for the owner and is instrumental in bringing the owner and the buyer together and the owner then concludes the sale at a less price than the agent was authorized to sell for, the agent is entitled to compensation for his services. (Wright v. McClintock, 136 Ill. App. 438; Wilson v. Mason, 158 Ill. 304; Hafner v. Herron, *supra*; Rigdon v. More, *supra* [226 Ill. 382].)" (Francisco v. Coleman, 230 Ill. App. 465, 470.)

"If plaintiff in error had been employed by the seller to find a purchaser for the property and through his efforts the owner had been brought into communication with the purchaser, plaintiff in error could not be deprived of his commissions because the owner of the property took up and completed the negotiations himself or through another party. (Hafner v. Herron, 165 Ill. 242.) * * * * * It is sufficient if the sale is effected through the efforts of the broker or through information derived from him. (Sussdorf v. Schmidt, 55 N. Y. 319; Stewart v. Mather, 32 Wis. 344; Lincoln v. McClatchie, 36 Conn. 136.) It is also true that where the seller consummates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions. - Stewart v. Mather, *supra*.' A very instructive case, with exhaustive

price; that in the instant case plaintiff testified that defendant told him he wanted \$2,500 an acre for the property; that as the sale was made for \$2,083-1/3 per acre, plaintiff did not find a purchaser who was ready, willing and able to pay the sixty acres at \$2,500 per acre and therefore he is not entitled to commission. This contention maintains plaintiff's testimony. Indeed, defendant testified, "I didn't tell him that it was around \$2,500 an acre. I never gave him a price. When he came and talked to me about a selling agreement, I did not give him a price. He did not mention a price to me." Plaintiff's testimony is to the effect that he was to find a buyer satisfactory to defendant. He did so and the deal was closed on a basis satisfactory to defendant. The mere fact that in closing the contract the price fixed was somewhat less than \$2,500 an acre does not deprive plaintiff, under the facts, of his commission.

"It is also true, that, when the seller communicates a price of property upon different terms than those offered to his agent, the latter will not be thereby deprived of his right to his commissions." (Harris v. Harris, 125 Ill. 282, 286-7.)

"The only theory upon which the plaintiff could possibly recover a commission in this case, according to his own testimony, is, that he furnished a purchaser who was able and ready to purchase the farm on the terms upon which it was placed in his hands, or upon terms satisfactory to the owner." (Coff v. Sullivan, 224 Ill. 309, 314.)

"Where an agent is employed to sell real estate for two or more and is instrumental in bringing the owner and the buyer together and the owner then concludes the sale at a less price than the agent was authorized to sell for, the agent is entitled to commission for his services." (Smith v. Smith, 125 Ill. 282, 286-7.)

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It is sufficient if the sale is effected through an effort of the broker or through information derived from him. (Coff v. Sullivan, 224 Ill. 309, 314.) It is also true that where the seller communicates a sale of property upon different terms than those proposed to his agent, the latter will not be thereby deprived of his right to his commissions. (Harris v. Harris, 125 Ill. 282, 286-7.) A very instructive case, with exhaustive

notes, will be found in Hoadley v. Savings Bank of Danbury, 44 L. R. A. 321.)" (Rigdon v. More, 226 Ill. 382, 387-8. See also Rasar & Johnson v. Spurling, 176 Ill. App. 349, 351; Wright v. McClintock, 136 Ill. App. 438, 442.)

"When a broker finds a prospective purchaser to whom a sale is subsequently made, and the negotiations between such broker and such purchaser have not been terminated, the intervening act of an outsider will not prevent the broker from collecting his commission, notwithstanding the purchaser may have been finally persuaded to buy through the advice of such outsider. Elmendorf v. Golden, 37 Wash. 664, 80 Pac. 264; Dowling v. Morrill, 165 Mass. 491, 43 N. E. 295; Rigdon v. More, 226 Ill. 382, 80 N. E. 901." (Chambers v. Farnham, 236 Fed. 886, 889.)

The jury were fully warranted in finding that plaintiff introduced the parties, submitted the property, assisted in the negotiations, was the procuring cause of the sale that was made, and that the sale was satisfactory to defendant. Four juries have refused to believe the testimony of defendant that he, not plaintiff, was the procuring cause of the sale, and they doubtless believed that if, in fact, defendant received a commission from the syndicate such action was intended to aid defendant in unjustly depriving plaintiff of his commission.

Defendant contends that plaintiff abandoned his contract. The jury found against that contention, and we are satisfied with their finding.

Defendant contends that "two of plaintiff's instructions were not supported by law or the evidence," and that an instruction of his that was refused should have been given. No instructions are set out in the brief.

"Counsel for plaintiff criticizes instructions given on behalf of defendant and the refusal of the trial court to give one requested by plaintiff. These instructions are not set out in the brief. It has been repeatedly held that instructions of which complaint is made should be set out in full in the brief, followed by definite and clear reasons supporting the alleged errors incident thereto. General Platers Supply Co. v. L'Honniedieu & Sons Co., 228 Ill. App. 201; Harris v. Piggly Wiggly Stores, Inc., 236 Ill. App. 392; Spencer v. Chicago & N. W. Ry. Co., 249 Ill. App. 463; Roy Iverson Co. v. U. S. Lloyds, Inc., 251 Ill. App. 150; Cory v. Woodmen Accident Co., 253 Ill. App. 20; In re Estate of Good v. Tyler, 256 Ill. App. 401." (Zorger v. Hillman's, 287 Ill. App. 357, 359.)

We have seen fit, however, to examine, in the abstract, the three instructions, and we find no reversible error in the action of the

notes, will be found in Hodges v. Evans Bank of Danbury, 44
Conn. 321. (1871), 328 Ill. 38, 329-30, 330-31, 331-32, 332-33, 333-34, 334-35, 335-36, 336-37, 337-38, 338-39, 339-40, 340-41, 341-42, 342-43, 343-44, 344-45, 345-46, 346-47, 347-48, 348-49, 349-50, 350-51, 351-52, 352-53, 353-54, 354-55, 355-56, 356-57, 357-58, 358-59, 359-60, 360-61, 361-62, 362-63, 363-64, 364-65, 365-66, 366-67, 367-68, 368-69, 369-70, 370-71, 371-72, 372-73, 373-74, 374-75, 375-76, 376-77, 377-78, 378-79, 379-80, 380-81, 381-82, 382-83, 383-84, 384-85, 385-86, 386-87, 387-88, 388-89, 389-90, 390-91, 391-92, 392-93, 393-94, 394-95, 395-96, 396-97, 397-98, 398-99, 399-400, 400-401, 401-402, 402-403, 403-404, 404-405, 405-406, 406-407, 407-408, 408-409, 409-410, 410-411, 411-412, 412-413, 413-414, 414-415, 415-416, 416-417, 417-418, 418-419, 419-420, 420-421, 421-422, 422-423, 423-424, 424-425, 425-426, 426-427, 427-428, 428-429, 429-430, 430-431, 431-432, 432-433, 433-434, 434-435, 435-436, 436-437, 437-438, 438-439, 439-440, 440-441, 441-442, 442-443, 443-444, 444-445, 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1091-1092, 1092-1093, 1093-1094, 1094-1095, 1095-1096, 1096-1097, 1097-1098, 1098-1099, 1099-1100, 1100-1101, 1101-1102, 1102-1103, 1103-1104, 1104-1105, 1105-1106, 1106-1107, 1107-1108, 1108-1109, 1109-1110, 1110-1111, 1111-1112, 1112-1113, 1113-1114, 1114-1115, 1115-1116, 1116-1117, 1117-1118, 1118-1119, 1119-1120, 1120-1121, 1121-1122, 1122-1123, 1123-1124, 1124-1125, 1125-1126, 1126-1127, 1127-1128, 1128-1129, 1129-1130, 1130-1131, 1131-1132, 1132-1133, 1133-1134, 1134-1135, 1135-1136, 1136-1137, 1137-1138, 1138-1139, 1139-1140, 1140-1141, 1141-1142, 1142-1143, 1143-1144, 1144-1145, 1145-1146, 1146-1147, 1147-1148, 1148-1149, 1149-1150, 1150-1151, 1151-1152, 1152-1153, 1153-1154, 1154-1155, 1155-1156, 1156-1157, 1157-1158, 1158-1159, 1159-1160, 1160-1161, 1161-1162, 1162-1163, 1163-1164, 1164-1165, 1165-1166, 1166-1167, 1167-1168, 1168-1169, 1169-1170, 1170-1171, 1171-1172, 1172-1173, 1173-1174, 1174-1175, 1175-1176, 1176-1177, 1177-1178, 1178-1179, 1179-1180, 1180-1181, 1181-1182, 1182-1183, 1183-1184, 1184-1185, 1185-1186, 1186-1187, 1187-1188, 1188-1189, 1189-1190, 1190-1191, 1191-1192, 1192-1193, 1193-1194, 1194-1195, 1195-1196, 1196-1197, 1197-1198, 1198-1199, 1199-1200, 1200-1201, 1201-1202, 1202-1203, 1203-1204, 1204-1205, 1205-1206, 1206-1207, 1207-1208, 1208-1209, 1209-1210, 1210-1211, 1211-1212, 1212-1213, 1213-1214, 1214-1215, 1215-1216, 1216-1217, 1217-1218, 1218-1219, 1219-1220, 1220-1221, 1221-1222, 1222-1223, 1223-1224, 1224-1225, 1225-1226, 1226-1227, 1227-1228, 1228-1229, 1229-1230, 1230-1231, 1231-1232, 1232-1233, 1233-1234, 1234-1235, 1235-1236, 1236-1237, 1237-1238, 1238-1239, 1239-1240, 1240-1241, 1241-1242, 1242-1243, 1243-1244, 1244-1245, 1245-1246, 1246-1247, 1247-1248, 1248-1249, 1249-1250, 1250-1251, 1251-1252, 1252-1253, 1253-1254, 1254-1255, 1255-1256, 1256-1257, 1257-1258, 1258-1259, 1259-1260, 1260-1261, 1261-1262, 1262-1263, 1263-1264, 1264-1265, 1265-1266, 1266-1267, 1267-1268, 1268-1269, 1269-1270, 1270-1271, 1271-1272, 1272-1273, 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1364-1365, 1365-1366, 1366-1367, 1367-1368, 1368-1369, 1369-1370, 1370-1371, 1371-1372, 1372-1373, 1373-1374, 1374-1375, 1375-1376, 1376-1377, 1377-1378, 1378-1379, 1379-1380, 1380-1381, 1381-1382, 1382-1383, 1383-1384, 1384-1385, 1385-1386, 1386-1387, 1387-1388, 1388-1389, 1389-1390, 1390-1391, 1391-1392, 1392-1393, 1393-1394, 1394-1395, 1395-1396, 1396-1397, 1397-1398, 1398-1399, 1399-1400, 1400-1401, 1401-1402, 1402-1403, 1403-1404, 1404-1405, 1405-1406, 1406-1407, 1407-1408, 1408-1409, 1409-1410, 1410-1411, 1411-1412, 1412-1413, 1413-1414, 1414-1415, 1415-1416, 1416-1417, 1417-1418, 1418-1419, 1419-1420, 1420-1421, 1421-1422, 1422-1423, 1423-1424, 1424-1425, 1425-1426, 1426-1427, 1427-1428, 1428-1429, 1429-1430, 1430-1431, 1431-1432, 1432-1433, 1433-1434, 1434-1435, 1435-1436, 1436-1437, 1437-1438, 1438-1439, 1439-1440, 1440-1441, 1441-1442, 1442-1443, 1443-1444, 1444-1445, 1445-1446, 1446-1447, 1447-1448, 1448-1449, 1449-1450, 1450-1451, 1451-1452, 1452-1453, 1453-1454, 1454-1455, 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court in reference to the same.

As has been stated by our Supreme court upon a number of occasions, where three juries have found the facts the same way, it is eminently proper that there should be at an end to the controversy so far as the facts are concerned, and that unless material errors of law have intervened or it is made to appear that passion, partiality or prejudice have guided the verdict, the facts three times determined the same way should be deemed conclusive. (See Norkevich v. Atchison, T. & S. F. Ry. Co., supra.) Here, four juries have believed plaintiff's testimony and have disbelieved defendant's testimony. Eleven years have elapsed since this suit was commenced. There should be an end to this litigation.

Defendant has failed to point out any reversible error in the record, and the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

court in reference to the same.
It has been stated by our Supreme Court upon a number of
occasions, where three justices have found the facts the same way, it
is eminently proper that there should be an end to the contro-
versy as far as the facts are concerned, and that unless material
error of law have intervened or it is made to appear that partiality
or prejudice have guided the verdict, the facts thus
times determined the same way should be deemed conclusive. (See
Nebraska v. Atchison, T. & S. F. Ry. Co., supra.) Here, four justices
have believed plaintiff's testimony and have disbelieved defendant's
testimony. Eleven years have elapsed since this suit was commenced.
There should be an end to this litigation.
Defendant has failed to point out any reversible error in the
record, and the judgment of the Circuit Court of Cook County is
affirmed.

JUDGMENT AFFIRMED.

Filed, p. 7, and delivered, 7, 1907.

38056

CHARLES F. GREY et al.,
Appellees,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

291 I.A. C08³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with cases numbered 38057, 38058 and 38060, was consolidated for hearing in this court with case No. 38059.

Defendant, City of Chicago, seeks by this appeal to reverse a judgment entered against it in favor of plaintiffs, Charles F. Grey and Newton Fox Grey, executors and trustees of the estate of Charles F. Grey, deceased, for \$18,378.88. This judgment comprises the item of \$12,711.70, representing interest at 5% per annum on a condemnation judgment for \$290,500, from the date of its entry August 7, 1924, until June 28, 1925, the date of the final payment thereon, and the item of \$5,667.18, representing interest at 5% per annum on said \$12,711.70 interest, from the date of the final payment on the principal of the condemnation judgment June 28, 1925, until December 1, 1934, when the judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The University of Chicago v. City of Chicago, Gen. No. 38059, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause the judgment is here in all respects affirmed except as to its allowance of the additional interest of \$5,667.18, is reversed as to this last mentioned item and the cause is remanded with directions to disallow same and to enter judgment for the interest ^{in the sum} of \$12,711.70. JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS. Friend, P. J., and Scanlan, J., concur.

CHARLES F. GREY et al.,
Appellees,

v.

CITY OF CHICAGO,
Appellant.

291 I.A. 308

COOK COUNTY.

MR. JUSTICE SULLIVAN: DELIVERED THE OPINION OF THE COURT.

This appeal, together with cases numbered 38087, 38088 and 38089, was consolidated for hearing in this court with case No. 38080. Defendant, City of Chicago, seeks by this appeal to reverse a judgment entered against it in favor of plaintiffs, Charles F. Grey and Newton Rex Grey, executors and trustees of the estate of Charles F. Grey, deceased, for \$18,376.18. This judgment comprises the item of \$12,711.70 representing interest at 5% per annum on a condemnation judgment for \$200,500, from the date of its entry, August 7, 1934, until June 28, 1935, the date of the final payment thereon, and the item of \$5,667.18, representing interest at 5% per annum on said \$12,711.70 interest, from the date of the final payment on the principal of the condemnation judgment June 28, 1935, until December 1, 1934, when the judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The University of Chicago v. City of Chicago, 291 I.A. 308, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause the judgment is here in all respects affirmed except as to the allowance of the additional interest of \$5,667.18, is reversed as to this last mentioned item and the cause is remanded with directions to allow same and to enter judgment for the interest of \$12,711.70. JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

38057

WILLIAM G. McCORMICK,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

291 I.A. 308⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with cases numbered 38056, 38058 and 38060, was consolidated for hearing in this court with case No. 38059.

Defendant, City of Chicago, seeks by this appeal to reverse a judgment in favor of William G. McCormick for \$2,213.15. This judgment comprises the item of \$1,503.44, representing interest at 5% per annum on a condemnation judgment for \$40,000, from the date of its entry August 18, 1924, until June 9, 1925, the date of the final payment thereon, and the item of \$709.71, representing interest at 5% per annum on said \$1,503.44 interest, from the date of the final payment on the principal of the condemnation judgment June 9, 1925, until December 1, 1934, when judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The University of Chicago v. City of Chicago, Gen. No. 38059, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause the judgment is here in all respects affirmed except as to its allowance of the additional interest of \$709.71, is reversed as to this last mentioned item and the cause is remanded with directions to disallow same and to enter judgment for the interest ^{in the sum} of \$1,503.44.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART
AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

800 I.A. 308

[Handwritten signature and initials]

WILLIAM G. WOODWARD,
Appellant,
v.
CITY OF CHICAGO,
Appellee.

MR. JUSTICE WILLIAM BREWER THE CHIEF OF THE COURT.

This appeal, together with cases numbered 2808, 2809 and 2810, was consolidated for hearing in this court with case No. 2807. Defendant, City of Chicago, seeks by this appeal to reverse a judgment in favor of William G. Woodward for \$2,312.15. This judgment comprises the item of \$1,502.44, representing interest at 6 per cent on a condemnation judgment for \$40,000, from the date of the entry of said judgment, until June 9, 1913, the date of the final payment thereon, and the item of \$819.71, representing interest at 6 per cent on said \$1,502.44 judgment, from the date of the final payment on the principal of the condemnation judgment, June 9, 1913, until December 1, 1913, when judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The City of Chicago v. City of Chicago, Gen. No. 2808, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause the judgment is here in all respects affirmed except as to the allowance of the additional interest of \$79.71, as returned as to this last mentioned item and the same is remanded with directions to disallow same and to enter judgment for the interest for \$1,502.44.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART.
AND A NEW JUDGMENT IN THE INTEREST.
Filed, 7. 1. 14 and certified, 1. 1. 14.

38058

THE UNIVERSITY OF CHICAGO,
Appellee,

v.

CITY OF CHICAGO,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

291 I.A. 609¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with cases numbered 38056, 38057 and 38060, was consolidated for hearing in this court with case No. 38059.

Defendant, City of Chicago, seeks by this appeal to reverse a judgment entered against it in favor of The University of Chicago for \$8,819.86. This judgment comprises the item of \$6,095.28, representing interest at 5% per annum on a condemnation judgment for \$191,000, from the date of its entry August 7, 1924, until March 21, 1925, the date of the final payment thereon, and the item of \$2,724.58, representing interest at 5% per annum on said \$6,095.28 interest, from the date of the final payment on the principal of the condemnation judgment March 21, 1925, until December 1, 1934, when the judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The University of Chicago v. City of Chicago, Gen. No. 38059, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause the judgment is here in all respects affirmed except as to its allowance of the additional interest of \$2,724.58, is reversed as to this last mentioned item and the cause is remanded with directions to disallow same and enter judgment for the interest ^{in the sum} of \$6,095.28.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART
AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

THE UNIVERSITY OF CHICAGO,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

IN THE CIRCUIT COURT OF APPEALS

OF THE STATE OF ILLINOIS

35052 P.A. 609

MR. JUSTICE BULLMAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with cases numbered 35053, 35054 and 35055, was consolidated for hearing in this court with case No. 35050. Defendant, City of Chicago, seeks by this appeal to reverse a judgment entered against it in favor of The University of Chicago for \$2,819.88. This judgment comprises the item of \$2,088.28 representing interest at 5% per annum on a concession judgment for \$41,000, from the date of its entry, August 7, 1924, until March 21, 1925, the date of the final payment thereon, and the item of \$731.60, representing interest at 5% per annum on said \$2,088.28 interest, from the date of the final payment on the principal of the concession judgment March 21, 1925, until December 1, 1925, when the judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The University of Chicago v. City of Chicago, 35050, No. 35050, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that case the judgment is here in all respects affirmed except as to the allowance of the additional interest of \$731.60, is reversed as to this last mentioned item and the cause is remanded with directions to the court below to enter judgment for the interest of \$2,088.28. JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS.

WILLIAM D. BULLMAN, J., concurring.

38059

THE UNIVERSITY OF CHICAGO,
Appellee,

v.

CITY OF CHICAGO,

Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

291 I.A. 609²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant, City of Chicago, one of a group of five cases consolidated for hearing in this court, seeks to reverse a judgment for \$22,475.22 entered against it in an action of trespass on the case brought by plaintiff, The University of Chicago, for alleged wrongful and illegal failure and refusal of defendant to pay interest on a final judgment awarding \$380,847 as compensation and damages for certain property belonging to plaintiff acquired for public use in condemnation proceedings brought by the City of Chicago. Pursuant to the mandate of this court on a prior appeal defendant's general demurrer to plaintiff's declaration was overruled, and defendant electing to stand by its demurrer the judgment appealed from was entered. It comprises the item of \$15,668.11, representing interest at 5% per annum on the condemnation judgment for \$380,847, from the date of its entry, August 18, 1924, until March 26, 1926, the date of the final payment thereon, and the item of \$6,807.11, representing interest at 5% per annum on said \$15,668.11 interest, from the date of the final payment on the principal of the condemnation judgment March 26, 1926, until December 1, 1934, when the judgment was entered in the trial court in the instant case.

The declaration alleged substantially that defendant brought proceedings to condemn land owned by plaintiff for a street improve-

THE UNIVERSITY OF CHICAGO,
Appellee,

CITY OF CHICAGO,

Appellant.

3211 A. 609

MR. JUSTICE SULLIVAN delivered the opinion of the court.

This appeal by defendant, City of Chicago, one of a group of five cases consolidated for hearing in this court, seeks to reverse a judgment for \$28,475.32 entered against it in an action of trespass on the case brought by plaintiff, The University of Chicago, for alleged wrongful and illegal taking and removal of defendant to pay interest on a final judgment awarding \$30,347 as compensation and damages for certain property belonging to plaintiff acquired for public use in condemnation proceedings brought by the City of Chicago. Pursuant to the mandate of this court on a prior appeal defendant's general demurrer to plaintiff's declaration was overruled, and defendant elected to stand by its answer the judgment appealed from was entered. It comprises the item of \$15,000.00, representing interest at 5% per annum on the condemnation judgment for \$200,000.00, from the date of its entry, August 18, 1934, until March 26, 1936, the date of the final payment thereon, and the item of \$8,207.11, representing interest at 5% per annum on said \$15,000.00 interest, from the date of the final payment on the principal of the condemnation judgment March 26, 1936, until December 1, 1934, when the judgment was entered in the trial court in the instant case.

The declaration alleged substantially that defendant brought proceedings to condemn land owned by plaintiff for a street improve-

ment under the Local Improvement act and that in due course "a finding or verdict" was rendered fixing \$380,847 as the just compensation to be paid for the land; that defendant elected within ninety days after the final adjudication to cause to be entered a final judgment upon the award; that thereafter defendant insisted that it had the right to take possession of the condemned land upon payment of the principal of the judgment without interest and plaintiff insisted that it was entitled to receive interest at the rate of 5% per annum from the date of the condemnation judgment until it was paid; and that, thereupon, a stipulation was entered into between the parties, which is in part as follows:

"WHEREAS, it is the contention of the aforesaid defendant, The University of Chicago, the owner of the hereinbefore described premises, that the aforesaid final judgment (less assessment as provided by Section 16 of the Local Improvement Act of 1897, as amended) bears interest at the rate of five (5) per cent per annum from the date of its entry until paid, and that the said City of Chicago is without the right to take possession of the premises aforesaid until it has paid the said judgment (less assessment as provided by Section 16 of the Local Improvement Act of 1897 as amended), including interest, as aforesaid, and it is the contention of the said City of Chicago that the said judgment does not bear interest, as aforesaid, and that it, the City of Chicago, has the right to take possession of the premises aforesaid upon payment of the amount of said judgment (less assessment, as provided by Section 16 of the Local Improvement Act of 1897, as amended), without interest; and

"WHEREAS, the City of Chicago now desires that The University of Chicago, owner as aforesaid, shall proceed at once to the remodeling of its building located in part on the aforesaid land and to clear said land of the improvements now located thereon prior to the payment by the City of Chicago of the award aforesaid, and the said The University of Chicago is willing to so proceed upon the terms and conditions hereinafter set forth,

"NOW, THEREFORE, IT IS STIPULATED AND AGREED by and between the aforesaid parties hereto that simultaneously with the execution and delivery hereof, the said City of Chicago shall, without prejudice, pay to the said The University of Chicago, defendant, the sum of Fifty Thousand (\$50,000) Dollars on account of the aforesaid judgment, and that the said The University of Chicago thereupon immediately will begin the remodeling of its building and the removal of the improvements as aforesaid, and that from time to time, as the work of remodeling and removing progresses, the City of Chicago shall pay additional sums on account of the aforesaid judgment as the same are needed and called for by The University of Chicago for the payment of the aforesaid work being done by it; but it is expressly understood and agreed that the said The University of Chicago shall retain complete possession, control and ownership of the aforesaid land until the City of Chicago shall have paid the full amount of the aforesaid judgment (less assessment, as provided by Section 16

ment under the local improvement act and that in the course of
financing or vesting" was rendered fixing \$38,847 as the just
compensation to be paid for the land; that defendant entered
within ninety days after the final adjudication to cause to be
entered a final judgment upon the merits; that after defendant
instated that it had the right to take possession of the contested
land upon payment of the principal of the judgment without interest
and plaintiff instated that it was entitled to receive interest at
the rate of 6 per annum from the date of the condemnation judgment
until it was paid; and that, therefore, a stipulation was entered
into between the parties, which is in part as follows:

"WHEREAS, it is the contention of the plaintiff defendant,
The University of Chicago, the owner of the building hereinafter de-
scribed, that the aforesaid final judgment (Case No. 100,000) re-
solved by Section 16 of the Local Improvement Act of 1907, as
amended, bears interest at the rate of five (5) per cent per annum
from the date of its entry until paid, and that the said City of
Chicago is entitled to the right to take possession of the premises
aforesaid until it has paid the said judgment (Case No. 100,000) as
provided by Section 16 of the Local Improvement Act of 1907, as
amended, and that it is the contention of the defendant
that the said City of Chicago that the said judgment was not in-
terested, and that it is the contention of the plaintiff that the
said City of Chicago, and that it is the contention of the plaintiff
to the possession of the premises aforesaid upon payment of the
amount of said judgment (Case No. 100,000) as provided by Section 16
of the Local Improvement Act of 1907, as amended, without interest;
and

"AND WHEREAS, the City of Chicago has agreed that the University
of Chicago, owner of the building, shall proceed at once to the pay-
ment of its building located in the said premises and to the pay-
ment by the City of Chicago of the interest thereon until the said
University of Chicago is willing to be paid upon the terms and
conditions hereinafter set forth;

"NOW, THE CITY OF CHICAGO, in consideration of the fact that the
aforesaid parties hereto have mutually agreed with the execution
and delivery hereof, the said City of Chicago will, without pre-
judice, pay to the said University of Chicago, hereinafter, the sum
of fifty thousand (\$50,000) dollars in payment of the aforesaid judg-
ment, and that the said University of Chicago thereupon imme-
diately will begin the removal of its building and the removal of
the improvements thereon, and that from time to time, as the
work of removal and removing progresses, the City of Chicago shall
pay additional sums on account of the aforesaid judgment as the same
are needed and called for by the University of Chicago for the pay-
ment of the aforesaid judgment; and that it is expressly
understood and agreed that the said University of Chicago shall
retain complete possession, control and occupancy of the premises
land until the City of Chicago shall have paid the full amount of
the aforesaid judgment (Case No. 100,000) as provided by Section 16

of the Local Improvement Act of 1897, as amended), and that upon the payment of the full amount of the aforesaid judgment by the City of Chicago, without interest, but with the right reserved to the said defendant to sue for and collect interest upon said judgment if and as it may be adjudged the same bears interest, the said City of Chicago may thereupon immediately enter into possession of the said premises, and the said defendant shall, in accepting payments, as aforesaid, and in permitting the entry by the said City of Chicago into possession of the said premises, do so without prejudice to its right to sue for and collect interest upon said judgment if and as it may be adjudged the same bears interest."

The declaration alleged further that after the execution and delivery of the stipulation defendant took actual, formal and permanent possession of the condemned premises and paid the principal of the judgment in full, but never paid any interest thereon and refused and still refuses so to do "in violation of its plain, legal duty in that behalf."

The first question presented is whether a final and unconditional judgment for compensation entered in conformity with sec. 32 of the Local Improvement act (Illinois State Bar Stats. 1935, chap. 24, par. 120 et seq.) draws interest from the date of its entry until the date of its payment. Our Supreme court has decided this identical question affirmatively in Turk v. City of Chicago, 352 Ill. 171, Feldman v. City of Chicago, 363 Ill. 247, and in Blaine v. City of Chicago, 366 Ill. 341 (advance sheets). In the Turk case, supra, it was held at pp. 180, 181:

"In no case has there arisen the applicability of section 3 of the Interest act to a judgment final and unconditional under section 32 of the Local Improvement act, as the record shows this judgment to be. It seems clear that under section 32 the judgment in condemnation against appellant is final and unconditional and must be paid without regard to whether the property is taken. Such a judgment, therefore, must be held to bear interest under section 3 of the Interest act. Cases holding that possession must first be taken are not applicable to this situation."

And again in 1936 in the Feldman case, supra, the Supreme court held at pp. 248, 249 and 254-55:

"The identical question here present was settled by this court in the case of Turk v. City of Chicago, 352 Ill. 171. It

of the Local Improvement Act of 1897, as amended), and that upon the payment of the full amount of the assessed judgment by the City of Chicago, without interest, but with the right reserved to the said defendant to sue for and collect interest upon said judgment if and as it may be adjudged the same bears interest, the said City of Chicago may thereupon immediately enter into possession of the said premises, and the said defendant shall, in accepting payment, as aforesaid, and in permitting the entry by the said City of Chicago into possession of the said premises, be so without prejudice to its right to sue for and collect interest upon said judgment if and as it may be adjudged the same bears interest."

The defendant alleged further that after the execution and delivery of the stipulation before me, formal, formal and permanent possession of the condemned premises and paid the principal of the judgment in full, but never paid any interest thereon and refused and still refuses so to do "in violation of its plain, legal duty in that behalf."

The first question presented is whether a final and unconditional judgment for compensation entered in conformity with sec. 32 of the Local Improvement Act (Illinois State Bar Assn. 1938, Chap. 24, par. 120 et seq.) draws interest from the date of its entry until the date of its payment. Our supreme court has decided this identical question affirmatively in Tark v. City of Chicago, 352 Ill. 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"In no case has there arisen the applicability of section 3 of the interest act to a judgment final and unconditional under section 32 of the Local Improvement Act, as the record shows this judgment to be. It seems clear that under section 32 the judgment in condemnation against appellant is final and unconditional and must be paid without regard to whether the property is taken. Such a judgment, therefore, must be held to bear interest under section 3 of the interest act. Cases holding that condemnation must first be taken are not applicable to this situation."

And again in 1936 in the Wilkens case, supra, the supreme court held at pp. 242, 243 and 251-252:

"The identical question here present was settled by this court in the case of Tark v. City of Chicago, 352 Ill. 171. It

was there held, after an exhaustive review of prior decisions, that section 3 of the general statute on interest applies to final and unconditional judgments entered against municipalities in condemnation proceedings. Section 3, in part provides: 'Judgments recovered before any court or magistrate shall draw interest at the rate of five (5) percentum per annum from the date of the same until satisfied.' The statute is express and clear. No exception is made therein as to judgments rendered as compensation for lands damaged or taken for public use. Under such circumstances we held in Epling v. Dickson, 170 Ill. 329: 'No exception is made in the statute where a judgment has been rendered as compensation for lands taken or damaged for public use, and in the absence of an exception the statute which controls judgments in other cases must control here. Moreover, it has often been held that a final judgment for the amount found to be due as just compensation will draw interest. Cook v. South Park Com'rs, 61 Ill. 115; City of Chicago v. Palmer, 93 id. 125.' ***

"The decision of the Appellate court that the city was not liable for interest in this case was based largely upon an ingenious argument of counsel, repeated here, that when the owners accepted payment of the principal of the judgment they abandoned whatever claim they might have had to interest. This argument, however, finds no support either in the admitted facts before us, in the provisions of the statutes or in the decisions of this court. It ignores the essential fact that here the interest is purely statutory, and arises neither from an agreement, express or implied, nor by way of damages or penalty for delay in payment of the principal. None of the necessary elements of accord and satisfaction exist here, as the claim was for a sum certain, the amount was not in dispute, and there was no offer to pay or accept less than the judgment in full settlement. On the contrary, it is conceded that when the city paid the judgment the owners then demanded interest and accepted under protest the payment of the judgment without interest. Under these circumstances there was no waiver of the interest."

The latest expression of the Supreme court on the subject is found in the Blaine case, supra, where the court, after referring to the Turk and Feldman cases, said:

"As a constitutional point not raised in any previous case, appellant now argues that the imposition of additional compensation in the form of interest is violative of section 13 of article 2 of the constitution of 1870, which establishes a jury as the exclusive tribunal to ascertain just compensation in condemnation proceedings. It is urged that a court cannot encroach upon the powers of a condemnation jury and that likewise the legislature, by passing an interest statute, cannot invade the jury's sphere of action, so as to authorize a court to increase an award made by a jury in condemnation proceedings. It is appellant's theory that if any delay occurs in the payment of a condemnation judgment, any damages thereby suffered by a property owner must be ascertained by a jury, after possession has been taken. This line of argument is ingenious, but finds its answer in the same section and article of the constitution relied upon for its support. The entry of a condemnation judgment on the verdict of a jury marks the end of the judicial inquiry required by section 13 of article 2 of the constitution. The constitutional requirement is then fully satisfied. The judgment or award in condemnation proceedings is always fixed in terms of money. This judgment, once made, does not differ in effect from any other judgment. It is commonly recognized in all jurisdictions that when a

of Ill. 115; City of Chicago v. Palmer, 93 Ill. 188; Cook v. South Park Home, first compensation will draw interest. Cook v. South Park Home, been held that a final judgment for the amount found to be due as judgments in other cases must control here. Moreover, it has often use, and in the absence of an exception the statute which controls rendered as compensation for lands taken or damaged for public 'No exception is made in the statute where a judgment had been such circumstances we held in Hollins v. Dickson, 170 Ill. 369; as compensation for lands damaged or taken for public use. Under clear. No exception is made therein as to judgments rendered date of the same until satisfied.' The statute is expressed and interest at the rate of five (5) percentum per annum from the 'Judgments recovered before any court or magistrate shall draw' Section 3, in part provides: in condemnation proceedings. Section 3, in part provides: final and unconditional judgments entered against municipalities to that section 3 of the general statute on interest applies to was there held, after an exhaustive review of prior decisions.

"The decision of the Appellate court that the city was not liable for interest in this case was based largely upon an ingenious argument of counsel, repeated here, that when the owners accepted payment of the principal of the judgment they abandoned whatever claim they might have had to interest. This argument, however, finds no support either in the admitted facts before us, in the provisions of the statutes or in the decisions of this court. It ignores the essential fact that here the interest is purely statutory, and arises neither from an agreement, express or implied, nor by way of damages or penalty for delay in payment of the principal. None of the necessary elements of accord and satisfaction exist here, as the claim was for a sum certain, the amount was not in dispute, and there was no offer to pay or accept less than the judgment in full settlement. On the contrary, it is conceded that when the city paid the judgment the owners then demanded interest and accepted under protest the payment of the judgment without interest. Under these circumstances there was no waiver of the interest."

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"As a constitutional point not raised in any previous case, appellant now argues that the imposition of additional compensation in the form of interest is violative of section 13 of article 2 of the constitution of 1870, which establishes a jury as the exclusive tribunal to ascertain just compensation in condemnation proceedings. It is urged that a court cannot encroach upon the power of a condemnation jury and that likewise the legislature, by passing an interest statute, cannot invade the jury's sphere of action, so as to authorize a court to increase an award made by a jury in condemnation proceedings. It is appellant's theory that if any delay occurs in the payment of a condemnation judgment, any damages thereby suffered by a property owner must be ascertained by a jury, after possession has been taken. This line of argument is ingenious, but finds little support. The entry of a condemnation judgment requires by section 13 of article 2 of the constitution on the verdict of a jury marks the end of the judicial inquiry required by section 13 of article 2 of the constitution. The constitutional requirement is then fully satisfied. The judgment or award in condemnation proceedings is always fixed in terms of money. This judgment, once made, does not differ in effect from any other judgment. It is commonly recognized in all jurisdictions that when a

final money judgment is not promptly paid, a loss is thereby suffered by the party entitled to its benefit. A common remedy has, therefore, been provided by the legislature as fair compensation for this delay in payment. It is found in the Interest act. The amount computed under the Interest act is to be paid for withholding payment of condemnation judgments. In this view of the case, the legislature and the judiciary have not violated any constitutional provisions, but have co-operated in securing to the property owner the just compensation to which he is entitled. Interest on the judgment cannot be considered a part of the value of the property as determined by the jury."

The law is now, therefore, conclusively established that a final condemnation judgment entered under sec. 32 of the Local Improvement act draws interest from the date of its entry until the date of its payment and it follows that plaintiff in this cause is entitled to receive \$15,668.11 as such interest.

As to plaintiff's further claim for interest on the said \$15,668.11 interest, from the date of the payment of the principal of the condemnation judgment until the date of the entry of the judgment by the trial court in the case at bar, which was allowed in the amount of \$6,807.11 in the judgment appealed from, it is sufficient to say that a like claim was disallowed in Blaine v. City of Chicago, supra, where the court said:

"In the case at bar, a condemnation judgment for \$168,404 was entered against appellant on July 16, 1924. March 27, 1925, this amount, without interest, was paid to the property owner, and accepted without prejudice to her right to recover interest. During the course of the condemnation proceedings the parties entered into a stipulation of facts which provided, in part, that the property owner preserved the right 'to take such steps *** necessary to recover interest on the judgment from the date of entry thereof.' Under this stipulation, it is apparent that the amount paid by the city was to be entirely applied to pay the principal of the judgment. The trial court entered judgment for interest at five per cent on \$168,404 from July 16, 1924, to March 27, 1925, in the sum of \$5,870.62 and then again computed the interest until July 15, 1936, at an additional sum of \$3,316.88, making an aggregate sum of \$9,187.50. This method of computation under the stipulation, was wrong. The correct amount of interest due is five per cent on \$168,404 from July 16, 1924, to March 27, 1925, \$5,870.62."

Prior to the acceptance by plaintiff of the payment of the principal amount of the condemnation judgment, the parties entered into the stipulation heretofore set forth in which they agreed "that upon the payment of the full amount of the aforesaid judgment by the City of Chicago, without interest, but with the right reserved

to said defendant to sue for and collect interest upon said judgment and as it may be adjudged the same bears interest, the said City of Chicago may thereupon immediately enter into possession of the said premises, and the said defendant shall, in receipt of the payments, as aforesaid, and in admitting the entry by the said City of Chicago into possession of the said premises, do so without prejudice to its right to sue for and collect interest upon said judgment, it and as it may be adjudged, the same bears interest." Under this stipulation, as under the stipulation in the Blinn case, "it is apparent that the amount paid by the city was to be entirely applied to pay the principal of the judgment" in the condemnation proceeding. That being so, all that plaintiff is entitled to recover is interest on the condemnation judgment from the date of its entry until said judgment was paid and the trial court clearly erred in including in the judgment in this case the additional amount of \$6,807.11.

The judgment of the Circuit court is in all respects affirmed except as to its allowance of the additional interest of \$6,807.11, is reversed as to this last mentioned item and the case is remanded with directions to disallow same and enter judgment for the interest in the sum of \$15,662.11.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CASE REMANDED WITH DIRECTIONS.

Friend, P. L., and Scanlon, J., concur.

38060

EDWARD T. BLAIR,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

25A
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

291 I.A. 609³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with cases numbered 38056, 38057 and 38058, was consolidated for hearing in this court with case No. 38059.

Defendant, City of Chicago, seeks by this appeal to reverse a judgment entered against it in favor of plaintiff, Edward T. Blair, for \$1,617.43. This judgment comprises the item of \$1,096.50, representing interest at 5% per annum on a condemnation judgment for \$42,000, from the date of its entry August 18, 1934, until February 20, 1925, the date of the final payment thereon, and the item of \$520.93, representing interest at 5% per annum on said \$1,096.50 interest, from the date of the final payment on the principal of the condemnation judgment February 20, 1925, until December 1, 1934, when the judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The University of Chicago v. City of Chicago, Gen. No. 38059, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause the judgment is here in all respects affirmed except as to its allowance of the additional interest of \$520.93, is reversed as to this last mentioned item and the cause is remanded with directions to disallow same and to enter judgment for the interest ^{in the sum} of \$1,096.50. JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS. Friend, P. J., and Scanlan, J., concur.

38080

EDWARD T. BLAIR,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

38080 I.A. 609

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal, together with cases numbered 38081, 38082 and 38083, was consolidated for hearing in this court with case No. 38080. Defendant, City of Chicago, seeks by this appeal to reverse a judgment entered against it in favor of plaintiff, Edward T. Blair, for \$1,617.43. This judgment comprises the sum of \$1,000.00, representing interest at 5% per annum on a condemnation judgment for \$20,000.00 from the date of its entry, August 18, 1934, until February 20, 1935, the date of the final payment thereof, and the sum of \$280.93, representing interest at 5% per annum on said \$1,000.00 from the date of the final payment on the principal of the condemnation judgment, February 20, 1935, until December 1, 1934, when the judgment was entered in the trial court in this cause.

The questions to be decided on this appeal are identical with those presented in The University of Chicago v. City of Chicago, No. 38081, in which an opinion is this day filed. That decision is controlling, and for the reasons stated in the opinion filed in that cause the judgment is here in all respects affirmed except as to its allowance of the additional interest of \$280.93, is reversed as to this last mentioned item and the cause is remanded with directions to allow same and to enter judgment for the interest of \$1,000.00 in the sum.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART AND CAUSE REMANDED WITH DIRECTIONS.

Wright, P. J., and McLaughlin, J., concur.

39104

PAUL GAWZNER,

Appellant,

v.

HERMAN R. ROSENBAUM and DAVID
S. KOMISS,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

291 I.A. 609⁴

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of the defendants and against the plaintiff for costs in a suit upon a note dated September 12, 1932, said note being for the principal sum of \$3,000, payable 120 days after its date, bearing interest at the rate of 6 per cent per annum and was made payable to Paul Gawzner at the Aurora Leland Hotel, Aurora, Illinois. The note was signed by "Rosenbaum, Inc., By H. R. Rosenbaum, Pres." On the reverse side of said note appears the following:

"Sept. 12, 1932
By credit on the within note \$1,000
Paul Gawzner
(Signed) H. R. Rosenbaum
David S. Komiss."

Service of process was not had on Herman R. Rosenbaum and the cause was tried as to David S. Komiss.

Plaintiff's statement of claim alleges that for value he purchased a certain promissory note, on the face of which it purports to be for \$3,000.00, upon which has been paid \$1,500.00, and that there is a balance of \$1,500.00 still due.

Defendants contend that the note when signed by Komiss was for \$3,000.00, and he signed it as an accommodation signer and after he had signed it, an endorsement was made thereon for \$1,000.00, which changed the amount due on the note in violation of the Negotiable Instruments Act and, for that reason, the endorser was released from any liability.

PAUL GAWNER,

Appellant,

v.

HERMAN R. ROSENBAUM and DAVID
S. KOMIS.

Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

291 I.A. 609

MR. PRESIDING JUSTICE DENIS L. SULLIVAN DELIVERED THE

OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of the defendants and against the plaintiff for costs in a suit upon a note dated September 12, 1932, said note being for the principal sum of \$3,000, payable 120 days after its date, bearing interest at the rate of 6 per cent per annum and was made payable to Paul Gawner at the Aurora Island Hotel, Aurora, Illinois. The note was signed by "Rosenbaum, Inc., By H. R. Rosenbaum, Pres." On the reverse side of said note appears the following:

"Sept. 12, 1932
By credit on the within note \$1,000
Paul Gawner
(Signed) H. R. Rosenbaum
David S. Komis."

Service of process was not had on Herman R. Rosenbaum and

the cause was tried as to David S. Komis.

Plaintiff's statement of claim alleges that for value he purchased a certain promissory note, on the face of which it purports to be for \$3,000.00, upon which has been paid \$1,800.00, and that there is a balance of \$1,200.00 still due.

Defendants contend that the note when signed by Komis was for \$3,000.00, and he signed it as an accommodation signer and after he had signed it, an endorsement was made thereon for \$1,000.00, which changed the amount due on the note in violation of the Negotiable Instruments Act and, for that reason, the endorser was released from any liability.

From the evidence it appears that Gawzner, the plaintiff, lived in Aurora, Illinois, and that Rosenbaum, one of the defendants, who was president of the concern known as Rosenbaum, Inc., was desirous of procuring a loan for the sum of \$5,000.00; that thereafter Rosenbaum and Komiss went to Aurora to see Gawzner to induce the latter to loan the money to the maker Rosenbaum, Inc., to buy some dresses for the store; that Gawzner told Komiss he would try to get the money to give Rosenbaum if he could "raise" it and Komiss would endorse the note and become personally liable. That he could not "raise" \$5,000.00 but would try to "raise" \$3,000.00.

The negotiations for the most part took place between Komiss and Gawzner, Komiss requesting the loan of as much money as he could get to buy dresses for the shop of Rosenbaum, Inc., which concern was engaged in selling dresses and in which Komiss' wife was a stockholder, and also for the Pandora Shop, which was owned by Komiss in whole or in part and operated by the Rosenbaum, Inc. It was finally agreed between them that Gawzner would loan them the most he could, if Komiss would become responsible for it and sign the note, which Komiss agreed to do.

The note in question was dated September 12, 1932, and was prepared in Chicago, by Komiss and Rosenbaum, and on that day Komiss sent Rosenbaum to see Gawzner and he took the said note with him which was made out for \$3,000.00, signed by Rosenbaum, Inc., by H. R. Rosenbaum, President, and endorsed on the back by Komiss and Rosenbaum personally. When Rosenbaum presented the note made out by Komiss to Gawzner, the latter said it was for too large an amount, as he had found that he could raise only \$2,000.00. After some discussion with Gawzner's lawyer, Rosenbaum endorsed on the back of the note a credit of \$1,000.00, leaving the balance due on the note \$2,000.00, which amount Gawzner thereupon gave to Rosenbaum in two checks, one for \$1,500.00 and one for \$500.00, both of which were paid. Before the note became due a payment of \$500 was paid

From the evidence it appears that Gawnner, the plaintiff, lived in Aurora, Illinois, and that Rosenbaum, one of the defendants, who was president of the concern known as Rosenbaum, Inc., was desirous of procuring a loan for the sum of \$5,000.00; that there- after Rosenbaum and Komias went to Aurora to see Gawnner to induce the latter to loan the money to the maker Rosenbaum, Inc., to buy some dresses for the store; that Gawnner told Komias he would try to get the money to give Rosenbaum if he could "raise" it and Komias would endorse the note and become personally liable. That he could not "raise" \$5,000.00 but would try to "raise" \$3,000.00. The negotiations for the most part took place between Komias and Gawnner, Komias requesting the loan of as much money as he could get to buy dresses for the shop of Rosenbaum, Inc., which concern was engaged in selling dresses and in which Komias' wife was a stockholder, and also for the Pandor Shop, which was owned by Komias in whole or in part and operated by the Rosenbaum, Inc. It was finally agreed between them that Gawnner would loan them the most he could, if Komias would become responsible for it and sign the note, which Komias agreed to do.

The note in question was dated September 12, 1932, and was prepared in Chicago, by Komias and Rosenbaum, and on that day Komias sent Rosenbaum to see Gawnner and he took the said note with him which was made out for \$5,000.00, signed by Rosenbaum, Inc., by H. R. Rosenbaum, President, and endorsed on the back by Komias and Rosenbaum personally. When Rosenbaum presented the note made out by Komias to Gawnner, the latter said it was for too large an amount, as he had found that he could raise only \$3,000.00. After some discussion with Gawnner's lawyer, Rosenbaum endorsed on the back of the note a credit of \$2,000.00, leaving the balance due on the note \$3,000.00, which amount Gawnner thereupon gave to Rosenbaum in two checks, one for \$1,500.00 and one for \$1,500.00, both of which were paid. Before the note became due a payment of \$500 was paid

upon the principal, leaving a balance due of \$1,500.00, plus interest.

On January 10, 1933, the note was protested by a notary public and notice thereof was given to Komiss that the maker had failed to pay the note and that the holder would look to him for payment, damages, interest and costs.

It is contended by the defendant Komiss that he was an accommodation endorser and that material alterations were made in the note without the knowledge of the signer of the same; that said alteration was in violation of Chapter 98, Paragraph 146, Section 124, Ill. State Bar Stats. 1935, which reads as follows:

"146. WHAT ALTERATIONS ARE MATERIAL] § 124. Any alteration which changes:

1. The date.
 2. The sum payable, either for principal or interest.
 3. The time or place of payment.
 4. The number and the relations of the parties.
 5. The medium or currency in which payment is to be made.
- Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

The evidence shows that Komiss was in fact the primary borrower and agreed with Gawzner to become personally liable if he would let him have as much money as he could. Several days later when Komiss sent Rosenbaum with a note to Gawzner made out for \$3,000.00, Gawzner informed him that he could raise only \$2,000.00. Whereupon, Rosenbaum made an endorsement of \$1,000.00 on the back of the note, thereby reducing the amount of the note to \$2,000.00.

The evidence further shows that Komiss, instead of being an accommodation endorser, was interested in the Rosenbaum, Inc., his wife being a stockholder and he also being an owner in some of its enterprises.

The evidence further shows that when Rosenbaum went to

upon the principal, leaving a balance due of \$1,500.00, plus interest.

On January 10, 1935, the note was protested by a notary public and notice thereof was given to Komias that the maker had failed to pay the note and that the holder would look to him for payment, damages, interest and costs.

It is contended by the defendant Komias that he was an accommodation endorser and that material alterations were made in the note without the knowledge of the signer of the same; that said alteration was in violation of Chapter 28, Paragraph 148, Section 184, Ill. State Bar Statute, 1935, which reads as follows:

"148. THAT ALTERATIONS ARE MATERIAL" § 184. Any

alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number and the relations of the parties.

5. The medium or currency in which payment is to be made.
Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

The evidence shows that Komias was in fact the primary borrower and agreed with Gwerner to become personally liable if he would let him have as much money as he could. Even 1 day later

when Komias sent Rosenbaum with a note to Gwerner made out for \$3,000.00, Gwerner informed him that he could raise only \$2,000.00. Whereupon, Rosenbaum made an endorsement of \$1,000.00 on the back of the note, thereby reducing the amount of the note to \$2,000.00.

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of its enterprises.

The evidence further shows that when Rosenbaum went to

Gawzner he want at the direction of Komiss to negotiate for the loan and whatever endorsements or changes that were made on the note by Rosenbaum were done by Rosenbaum representing Komiss as well as the maker in order to obtain the loan.

We do not believe that Komiss was in any sense an accommodation maker. As the court said in the case of Commonwealth National Bank v. Goldstein, 261 S. W. 538, page 541:

"To constitute one an 'accommodation maker,' he must not be the recipient of any consideration, as the very term implies an act without any consideration valuable in law moving to the party thus lending the use of his credit to another, but, to the contrary, that it is purely an act void of present or anticipated personal profit, gain or advantage, viz.: to oblige, the performance of an unselfish and friendly service for another, without receiving or expecting a quid pro quo."

Counsel for defendants cite the case of Keller v. Rock Island State Bank, 292 Ill. 553. We do not believe this case is applicable here.

The statute relating to changes made in negotiable instruments, Chapter 98, Paragraph 145, section 123, Ill. State Bar Stats. 1935, reads as follows:

"Where a negotiable instrument is fraudulently or materially altered by the holder without the assent of all the parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. * * *"

We do not believe that the endorsement on the back of the note indicating a payment of \$1,000.00, made by Rosenbaum, representing Komiss, could be considered as a material alteration or a fraudulent one or in any way affecting the rights of Komiss. Rosenbaum was sent to conclude the deal for the joint benefit of Komiss and Rosenbaum, Inc., and in that behalf he was Komiss' representative as well as representing the maker corporation, and Komiss should not now be permitted to take advantage of such act. A case wherein a similar situation arises is that of Bryan v. Dyer,

Whether he went at the direction of Komias to negotiate for the loan and whatever endorsements or changes that were made on the note by Rosenbaum were done by Rosenbaum representing Komias as well as the maker in order to obtain the loan.

We do not believe that Komias was in any sense an accommodation maker. As the court said in the case of National Bank v. Goldstein, 381 U.S. 535, page 541:

"To constitute one an accommodation maker, he must not be the recipient of any consideration, as the very term implies an act without any consideration valuable in law owing to the party thus lending the use of his credit to another, but to the contrary, that it is purely an act void of present or anticipated personal profit, gain or advantage, viz.: to oblige the performance of an unselfish and friendly service for another, without receiving or expecting a quid pro quo."

Counsel for defendants cite the case of Keller v. Back Island State Bank, 283 Ill. 533. We do not believe this case is applicable here.

The statute relating to changes made in negotiable instruments, Chapter 93, Part Graph 145, section 18, Ill. State Stat. 1935, reads as follows:

"Where a negotiable instrument is fraudulently or materially altered by the holder without the assent of all the parties liable thereon, it is voided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsements." * * *

We do not believe that the endorsement on the back of the note indicating a payment of \$1,000.00, made by Rosenbaum, representing Komias, could be considered as a material alteration or fraudulent one or in any way affecting the rights of Komias. Rosenbaum was sent to conclude the deal for the joint benefit of Komias and Rosenbaum, Inc., and in that behalf he was Komias' representative as well as representing the maker corporation, and Komias should not now be permitted to take advantage of such act. A case wherein a similar situation arises is that of Bryan v. Day.

28 Ill. 188. In the Bryan case suit was brought on an agreement upon which there had been an endorsement of payment which was afterwards erased. The court at page 201, said:

"As to the erasure of an indorsement on the writing, we cannot think it should vitiate the whole instrument. * * * The indorsement has no more validity or effect than a receipt, * * * To say, then, the obliteration of an indorsement of a payment on the note makes void the note, is to say that the destruction of a receipt for such a payment has the same effect, which is preposterous."

Prior to the Negotiable Instruments Laws, the Illinois decisions were to the effect that memoranda not in the body of the instrument are not considered as alterations.

Knoles v. Hill, Admx., eto. 25 Ill. 288, was a case wherein a note bearing interest at 10% had marked on its face, below the date and figures, the following memorandum: "When due to draw 15%". The court in its opinion on page 289, said:

"The memorandum on the note below the date and signatures and made by the payee is no part of the note."

Dr. Carr v. Weloh, Ex'r., eto., 46 Ill. 88, was a case where a suit was brought on a note payable in six months without interest. On the right hand corner of the note was written: "Ten per cent after due". It was urged that this was a material alteration. The court in its opinion at page 89, said:

"But the manner in which the words are added to the note is wholly inconsistent with the hypothesis that they were placed there with the fraudulent intent of making them a part of the note. They are not incorporated into the body of the instrument, but quite apart from it, the first two words being upon one line and the last two on the line below. * * * A memorandum may as properly be placed on the face as the back of the note if done in such mode as to deceive or injure no one and to show at a glance that no fraud can have been intended."

In Merritt v. Boyden & Son, 191 Ill. 136, the Supreme Court again had occasion to consider a similar question - the alteration of the amount of a note which was made out for \$100.00 and altered to read \$1300.00, by altering the marginal figures. The court, in ruling on the question of the marginal figures quoted from

28 Ill. 188. In the Bryan case suit was brought on an agreement

upon which there had been an endorsement of payment which was

afterwards erased. The court at page 201, said:

"As to the erasure of an endorsement on the writing, we cannot think it should vitiate the whole instrument. * * * The endorsement has no more validity or effect than a receipt. * * * To say, then, the obliteration of an endorsement of payment on the note makes void the note, is to say that the destruction of a receipt for such a payment has the same effect, which is preposterous."

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court, in ruling on the question of the marginal figures quoted from

numerous authorities to the effect that an alteration or erasure of the marginal figures is an immaterial alteration and will not affect the rights of the holder of the instrument.

In the instant case the change was made, so as to represent the real agreement and contract between the parties and was not done for any fraudulent purpose.

It is next contended that courts of appeal will not disturb the finding of trial courts without a jury, unless the judgment or decree was clearly and manifestly against the manifest weight of the evidence.

During the trial of this case there were numerous interruptions and arguments, so that the real situation was not developed in an orderly manner, as it should have been. We are satisfied from a review of all the evidence that the finding in favor of the defendant and against the plaintiff was manifestly against the weight of the evidence. We believe the evidence shows that the plaintiff, under the law, was entitled to recover the money he loaned with interest and, having come to this conclusion, the judgment of the Municipal Court ~~is~~ is reversed and a finding is entered here for the balance due on the note viz., \$1,500.00, with interest thereon according to the terms of said note.

JUDGMENT REVERSED AND JUDGMENT HERE.

HEBEL AND HALL, JJ. CONCUR.

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judgment of the Municipal Court was reversed and a finding is

entered here for the balance due on the note viz., \$1,500.00, with

interest thereon according to the terms of said note.

JUDGMENT REVERSED AND JURY TRIAL ORDERED.

HEBBERD AND HARRIS, JJ. CONCUR.

39182

ROBERT R. BAKER,

(Complainant) Appellant,

v.

WILLIAM H. BAKER, DIGORY W. BAKER,
AGNES BAKER NOURSE, and JOHN E.
SCULLY, Individually and as
Administrator of the Estate of
Julia Baker Scully, deceased,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

291 I.A. 609⁵

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

A bill was filed in the Circuit Court of Cook County by Robert R. Baker, plaintiff, asking the court to examine his account as trustee under the last will and testament of Agnes B. Baker, his mother. This appeal is from a part of the decree of the Circuit Court which disapproved the account of said plaintiff as trustee as to the sum of \$3,257.61 and also from that part of the decree which disapproved the item of fees credited to the plaintiff for services rendered as trustee for \$4,175.72.

Agnes B. Baker died on July 19, 1917, leaving a last will and testament duly executed and a codicil thereto. She left surviving her as legatees and devisees her sons, Robert R. Baker, Digory W. Baker, William H. Baker and her daughter Julia Baker Scully, and her adopted granddaughter Agnes Carolyn Baker. The will provided for a trust of two pieces of property situated at 3233-47 West Madison Street, Chicago, and 1753-58 West Monroe Street, Chicago, for the benefit of her daughter Julia Baker Scully and Agnes Carolyn Baker (Nourse), her adopted granddaughter; the trust to terminate on the death of Agnes Baker Scully, the daughter. By the codicil, plaintiff Robert R. Baker, was appointed sole executor and trustee under the provisions of the will. Said will and codicil were duly admitted to probate in the Probate Court of Cook County, Illinois,

COMMITTEE OF THE COURT

(Complainant) Applicant

v.

WILLIAM H. BAKER, DIRECTOR, and JAMES H. BAKER, individually and as Administrators of the Estate of Julius Baker, deceased.

(Defendants) Opponents

251 I.A. 603

THE PRESIDING JUSTICE DAVID E. BOWEN DELIVERED THE

OPINION OF THE COURT.

A bill was filed in the Circuit Court of Cook County by Robert A. Baker, plaintiff, asking the court to examine his account as trustee under the last will and testament of James H. Baker, his mother. This appeal is from a part of the decree of the Circuit Court which disapproved the account of said plaintiff as trustee as to the sum of \$2,075.61 and also from that part of the decree which disapproved the item of fees credited to the plaintiff for services rendered as trustee for \$1,175.72.

James H. Baker died on July 13, 1917, leaving a last will

and testament duly executed and a codicil thereto. The last

surviving her as legatee and devisee her sons, Robert A. Baker,

Directly A. Baker, William H. Baker and her daughter Julius Baker jointly,

and her adopted granddaughter James H. Baker. The will provided

for a trust of two shares of property situated at 233-47 West

Madison Street, Chicago, and 1751-53 West Monroe Street, Chicago,

for the benefit of her daughter Julius Baker jointly and James H. Baker

Baker (house), her adopted granddaughter; the trust to terminate on

the death of James Baker jointly, the daughter. By the codicil,

plaintiff Robert A. Baker, was appointed sole executor and trustee

under the provisions of the will. Said will and codicil were duly

admitted to probate in the Probate Court of Cook County, Illinois.

and the estate was duly administered and closed. Robert R. Baker duly qualified as trustee, and accepted the trust and commenced its administration.

From July 19, 1917 until November 21, 1931, the date on which the trust was terminated by the death of Julia Baker Scully, plaintiff, as trustee, managed and controlled the trust property and collected and distributed the income therefrom between Julia Baker Scully and Agnes Baker Nourse.

In March, 1923, the Monroe street property was sold by the complainant and on January 1, 1929, the Madison street property was leased for a term of 99 years, the building on the property being sold to the lessees. Plaintiff, under the terms of the will, invested and reinvested the proceeds from these transactions, treating said proceeds as part of the corpus and from time to time making distributions to the beneficiaries.

On October 29, 1920, Julia Baker Scully and plaintiff opened up a joint account in the Peoples Trust & Savings Bank of Chicago. This account was maintained by these parties until the death of the sister, Julia Baker Scully, in November, 1931. Plaintiff often made deposits for Mrs. Scully in this account and during Mrs. Scully's sickness he made deposits of every disbursement from the trust accruing as Mrs. Scully's share in said account. He sometimes endorsed the checks as Mrs. Scully's agent and at other times procured her endorsement and completed the manual acts of the deposit himself. On January 1, 1931, there was a balance on deposit in this account of \$2,157.07 and on November 21, 1931, the date of Mrs. Scully's death, a balance of \$3,257.61. This amount was withdrawn by complainant as surviving joint owner on December 7, 1931. It is this sum of \$3,257.61, that the decree finds was not accounted for or paid over by the trustee to Julia Baker Scully during her lifetime.

During the entire period of time that plaintiff acted as

and the estate was duly administered and closed. Robert R. Baker duly qualified as trustee, and accepted the trust and commenced its administration.

From July 13, 1917 until November 21, 1931, the date on which the trust was terminated by the death of Julia Baker Gouly, plaintiff, as trustee, managed and controlled the trust property and collected and distributed the income therefrom between Julia Baker Gouly and Agnes Baker Housse.

In March, 1932, the house street property was sold by the complainant and on January 1, 1933, the Madison street property was leased for a term of 99 years, the building on the property being sold to the lessee. Plaintiff, under the terms of the will, invested and reinvested the proceeds from these transactions, treating said proceeds as part of the corpus and from time to time making distributions to the beneficiaries.

On October 26, 1930, Julia Baker Gouly and plaintiff opened up a joint account in the Peoples Trust & Savings Bank of Chicago. This account was maintained by these parties until the death of the sister, Julia Baker Gouly, in November, 1931. Plaintiff often made deposits for Mrs. Gouly in this account and during Mrs. Gouly's sickness he made deposits of every disbursement from the trust accruing as Mrs. Gouly's share in said account. He sometimes endorsed the checks as Mrs. Gouly's agent and at other times procured her endorsement and completed the annual statement of the deposit himself. On January 1, 1932, there was a balance on deposit in this account of \$2,157.07 and on November 21, 1931, the date of Mrs. Gouly's death, a balance of \$3,257.61. This account was withdrawn by complainant as surviving joint owner on December 7, 1931. It is his sum of \$3,257.61, that the decedent funds were not accounted for or paid over by the trustee to Julia Baker Gouly during her lifetime. During the entire period of time that plaintiff acted as

trustee, he kept no accurate record of the time he expended on the management of the estate. The evidence shows that practically every day, however, either Mrs. Souilly or Agnes Baker Nourse spent a portion of the time with him, during which time trust matters were discussed.

The Monroe street property, located at 1752-58 West Monroe street, consisted of four old brick residences, and during the period from the closing of the estate of Agnes B. Baker up to March, 1932, the plaintiff, as trustee, managed and looked after this property, collecting the rents therefrom, paying taxes, water rents, insurance, costs of repairs and maintenance, and all other items that required attention in order to preserve and maintain this property. In March, 1923, this property was sold for \$15,000, the net proceeds of the sale being \$14,000 and this latter sum was invested in bonds.

The Madison street property, located at 3233-3247 West Madison street, Chicago was improved with a store and apartment building which plaintiff, as trustee, managed and looked after from 1918 to 1929. During this period complainant, as trustee, collected the rents from this property, supervised all expenditures, payment of taxes, insurance premiums, the making of repairs and necessary maintenance.

On January 1, 1929, the building on the Madison street property was sold and the ground leased under a 99 year lease. Proceeds of the sale of the building were \$50,000, and the net proceeds after payment of all expenses were invested in bonds by the trustee.

During the entire period of the trust, the trustee collected \$183,658.75. Of this amount \$65,578.43 were distributed to Mrs. Souilly from 1917 up to the time of her death in 1931, and \$65,579.89 were distributed to Agnes Baker Nourse during the same period. The balance of the collections made by the trustee was expended for various expenses incurred in connection with the handling and operation of the trust properties, and as compensation for the trustee during

trustee, he kept no accurate record of the time he expended on the management of the estate. The evidence shows that practically every day, however, either Mrs. Emily or James Baker House spent a portion of the time with him, during which time trust matters were discussed.

The Monroe street property, located at 1755-57 West Monroe street, consisted of four old brick residences, and during the period from the closing of the estate of Agnes B. Baker up to March, 1917, the plaintiff, as trustee, managed and looked after this property, collecting the rents therefrom, paying taxes, water rents, insurance, costs of repairs and maintenance, and all other items that required attention in order to preserve and maintain this property. In March, 1922, this property was sold for \$15,000, the net proceeds of the sale being \$14,000 and this latter sum was invested in bonds.

The Madison street property, located at 3227-2247 West Madison street, Chicago was improved with a store and apartment building which plaintiff, as trustee, managed and looked after from 1918 to 1922. During this period plaintiff, as trustee, collected the rents from this property, advertised all expenditures, payment of taxes, insurance premiums, the making of repairs and necessary maintenance.

On January 1, 1922, the building on the Madison street property was sold and the ground leased under a 50 year lease. Proceeds of the sale of the building were \$50,000, and the net proceeds after payment of all expenses were invested in bonds by the trustee. During the entire period of the trust, the trustee collected

\$187,628.75. Of this amount \$65,278.43 were distributed to Mrs. Emily from 1917 up to the time of her death in 1921, and \$65,278.32 were distributed to James Baker House during the same period. The balance of the collections made by the trustee was expended for various expenses incurred in connection with the handling and operation of the trust properties, and as compensation for the trustee during

the period of the trust.

The corpus of the trust at its termination was distributed to the surviving heirs, receipts being received. The trustee retained \$4,175.72 as fees for services rendered during the 14 years. The decree found this fee for services to be improper as to the defendant, John E. Scully.

Julia Baker Scully having died intestate, John E. Scully was appointed administrator of her estate. Thereafter Scully, as administrator, filed a petition in the Probate Court alleging plaintiff to be in control of certain assets of Julia Baker Scully. Plaintiff after submitting himself for an examination by the Probate Court, filed the present bill. On a hearing before the master the master recommended in his report that the plaintiff be allowed the relief prayed for. The court disapproved of the sum of \$3,357.61 as not properly accounted for or paid to Julia Baker Scully during her lifetime, and disapproved of plaintiff's fees as trustee, so far as it concerned John E. Scully, administrator.

Plaintiff contends that the trial court erred in refusing to grant the trustee the full compensation asked for because the trustee concededly acted in good faith throughout the entire trust administration, kept accurate books, and was guilty of no fraudulent or negligent acts sufficient to bar him from receiving the fee demanded for the services rendered by him.

Plaintiff further contends that the court was not justified in finding that the balance left in the joint bank account at the death of Mrs. Scully was not the rightful property of the trustee, and that the trustee had not paid over to the deceased beneficiary her share of the income from the trust estate during 1931.

Defendant, John E. Scully, individually and as administrator of his deceased wife's estate, Julia Baker Scully, contends that the purported claim of plaintiff to the balance of the funds remaining

the period of the trust.

The corpus of the trust at its termination was distributed to the surviving heirs, receipt being received. The trustee retained \$175.78 as fees for services rendered during the 14 years. The decree found this fee for services to be improper as to the defendant, John E. Souly.

Julia Baker Souly having died intestate, John E. Souly was appointed administrator of her estate. The said Souly, as administrator, filed a petition in the Probate Court alleging claimant to be in control of certain assets of Julia Baker Souly. Plaintiff after submitting himself for an examination by the Probate Court, filed the present bill. On a hearing before the master the master recommended in his report that the plaintiff be allowed the relief prayed for. The court disapproved of the sum of \$1,237.61 as not properly accounted for or paid to Julia Baker Souly during her lifetime, and disapproved of plaintiff's fees as trustee, so far as it concerned John E. Souly, administrator.

Plaintiff contends that the trial court erred in refusing to grant the trustee the full compensation asked for because the trustee concededly acted in good faith throughout the entire trust administration, kept accurate books, and was guilty of no fraudulent or negligent acts sufficient to bar him from receiving the fee demanded for the services rendered by him.

Plaintiff further contends that the court was not justified in finding that the balance left in the joint bank account at the death of Mrs. Souly was not the rightful property of the trustee, and that the trustee had not paid over to the deceased plaintiff her share of the income from the trust estate during 1911.

Defendant, John E. Souly, individually and as administrator of his deceased wife's estate, Julia Baker Souly, contends that the purported claim of plaintiff to the balance of the funds remaining

on deposit at the time of the death of Mrs. Scully is without merit, as plaintiff was occupying a fiduciary relationship with Mrs. Scully at the time of the execution of said joint deposit agreement; that there is no evidence that he ever at any time contributed anything, personally, to said account.

Defendant, John E. Scully, further contends that there is no evidence in the record as to the value of the services of said trustee and that the said sum of \$4,175.72, if properly charged and allowed, should be charged against the corpus of the trust estate; that in any event a charge for commissions, compensation and expense, if properly allowed, could not be charged to John E. Scully, as administrator, and that as administrator he is entitled to have and recover from plaintiff the proportionate share of the said \$4,175.72, together with interest thereon.

The evidence shows that the said John E. Scully gave notice of a cross-appeal from that portion of the decree which approves the report of the master, wherein said master recommends the approval of the trustee's account and also that portion of said decree approving said account, and asks for a reversal of the foregoing portions of said decree, and for an affirmance of the finding of said decree that there is due to John E. Scully, as administrator of the estate of Julia Baker Scully, deceased, the sums of \$3,257.61 and \$2,087.86, together with interest thereon at the rate of 5 per cent per annum from December 7, 1931, to the date of payment. Objection was made to the books of account kept by plaintiff personally during the years of his trusteeship, being submitted in evidence. They were properly admitted in evidence. Ryan Car Company v. Gardner, 154 Ill. App. 565.

The evidence further shows that the account of Robert R. Baker was approved by the other interested parties in the trusteeship, William H. Baker, Digory W. Baker, Agnes Baker Nourse, and it is also quite apparent that there is a more or less hostile feeling

on deposit at the time of the death of Mrs. Scully is without merit, as plaintiff was occupying a fiduciary relationship with Mrs. Scully at the time of the execution of said joint deposit agreement; that there is no evidence that he ever at any time contributed anything, personally, to said account.

Defendant, John E. Scully, further contends that there is no evidence in the record as to the value of the services of said trustee and that the said sum of \$4,145.72, if properly charged and allowed, should be charged against the corpus of the trust estate; that in any event a charge for commissions, compensation and expenses, if properly allowed, could not be charged to John E. Scully, as administrator, and that as administrator he is entitled to have and recover from plaintiff the proportionate share of the said \$4,145.72, together with interest thereon.

The evidence shows that the said John E. Scully gave notice of a cross-appeal from that portion of the decree which approves the report of the master, wherein said master recommends the approval of the trustee's account and also that portion of said decree approving said account, and asks for a reversal of the foregoing portions of said decree, and for an affirmance of the findings of said decree that there is due to John E. Scully, as administrator of the estate of Julia Baker Scully, deceased, the sum of \$3,687.81 and \$3,027.56, together with interest thereon at the rate of 5 per cent per annum from December 7, 1921, to the date of payment. Objection was made to the books of account kept by plaintiff personally during the years of his trusteeship, being admitted in evidence. They were properly admitted in evidence. Wynn Our Company v. Gardner, 124 Ill. App. 588. The evidence further shows that the account of Robert R.

Baker was approved by the other interested parties in the trusteeship. William H. Baker, Digney A. Baker, James Baker Norton, and it is also quite apparent that there is a more or less hostile feeling

between the plaintiff and the defendant Scully.

We shall first consider the item of \$3,257.61 on deposit in the Peoples Trust & Savings Bank, Chicago, under the joint account of Julia Baker Scully and Robert R. Baker, the plaintiff, and the tripartite agreement with the said bank under which the money was deposited and withdrawn, which reads as follows:

"THE PEOPLES TRUST AND SAVINGS BANK OF CHICAGO:

You are hereby authorized by the undersigned to honor and charge to this account any check, draft or other order signed by either of us individually. You are also hereby authorized and ordered to accept for credit to this account any check draft or other negotiable instrument payable to and endorsed by either of us to your order or otherwise. It is agreed that deposits made for credit to this account or any part of such deposits, or any interest or dividend thereon, may be paid to either of us whether the other be living or not, and that on the death of one of us the balance then remaining in this account shall become the sole property of, and shall be paid to, the survivor of us. You are authorized to forward items for collection or payment direct to the drawee of payer bank or through any other bank at your discretion and to receive payment in drafts drawn by the drawee or other banks, and except for negligence you shall not be liable for dishonor of the drafts so received in payment nor for losses thereon."

This contract was introduced in evidence as Defendant Scully's Exhibit 1, and was followed by 11 other exhibits, being monthly bank statements beginning with the month of January, 1931, and concluding with the month of November, 1931.

It is the contention of the defendant that, in so far as the bank deposits were concerned, the deposits by Baker in the bank under the agreement with his sister, were not in payment of the amount that was due her under the trust provided by the will. We do not so construe it. It is true that the plaintiff and his sister, Mrs. Scully, occupied the position of trustee and beneficiary and a fiduciary relationship existed so far as the handling of her share of the income and principal of the assets of the estate of Agnes B. Baker, their mother, was concerned. Defendants, however, admit that plaintiff was acting as Mrs. Scully's agent in depositing the money in the bank, hence the agent could not be criticized for doing as the principal requested. We know of no rule of law which would prevent

between the plaintiff and the defendant jointly.

It shall first consider the item of \$3,387.51 on deposit in the Peoples Trust & Savings Bank, Chicago, under the joint account of Julia Baker Conolly and Robert A. Baker, the plaintiff and the defendant, which was deposited with the said bank under which the money was deposited and withdrawn, which reads as follows:

"THE PEOPLES TRUST AND SAVINGS BANK OF CHICAGO:
You are hereby authorized by the undersigned to honor and charge to this account any check, draft or order signed by either of us individually. You are also hereby authorized and ordered to accept for credit to this account any check draft or other negotiable instrument payable to and endorsed by either of us to your order or otherwise. It is agreed that deposits made for credit to this account or any part of such deposits, or any interest or dividend thereon, may be paid to either of us whether the other be living or not, and that on the death of one of us the balance then remaining in this account shall become the sole property of, and shall be paid to, the survivor of us. You are authorized to forward items for collection or payment direct to the drawee of, or bank or through any other bank at your discretion and to receive payment in drafts drawn by the drawee or other banks, and except for negligence you shall not be liable for dishonor of the drafts so received in payment nor for losses thereon."

This contract was introduced in evidence as Defendant Conolly's Exhibit 1, and was followed by 11 other exhibits, being monthly bank statements beginning with the month of January, 1931, and concluding with the month of November, 1931.

It is the contention of the defendant that, in so far as the bank deposits were concerned, the deposits by Baker in the bank under the agreement with his sister, were not in payment of the amount that was due her under the trust provided by the will. He does not so construe it. It is true that the plaintiff and his sister, Mrs. Conolly, occupied the position of trustee and beneficiary and a fiduciary relationship existed so far as the handling of her share of the income and principal of the assets of the estate of Mrs. E. Baker, their mother, was concerned. Defendants, however, admit that plaintiff was acting as Mrs. Conolly's agent in depositing the money in the bank, hence the agent could not be criticized for doing as the principal requested. We know of no rule of law which would prevent

two parties - when dealing with a subject-matter outside of the trustee relationship - from entering into a joint agreement such as defendant's Exhibit 1, (which was a contract knowingly entered into with the Peoples Trust & Savings Bank of Chicago) in the absence of any evidence showing that Mrs. Scully was imposed upon. The testimony shows that this account was opened for the convenience of both parties, and as before stated, in the absence of any evidence of imposition or inability to enter into a contract, we do not think this fund can be followed and still be construed as trustee funds when, after it was allocated or paid to Mrs. Scully, it was voluntarily placed in the bank under a relationship which was perfectly legal and was done without any fraudulent inducements. Erwin v. Felter, 283 Ill. 36; Illinois Tr. & Sav. Bank v. Van Vlack, 310 Ill. 185.

Defendants next contend that the fees retained by the plaintiff as compensation for his work as trustee are not justified. There can be no rigid rule for the fixing of fees or compensation to be paid a trustee, as each case is different and must be controlled by its own facts and circumstances. Much depends upon the nature of the trust and the fund or property and the amount of work done relative thereto and the result thereof. The evidence shows that in this case, at the conclusion of plaintiff's services as executor, he took over the work as trustee; that the property consisted of real estate which he sold advantageously and invested the money in bonds which produced an income; that the balance of the property consisted of real estate which he leased at an advantageous figure for a period of 99 years; that the time consumed in doing this work extended over a period of approximately 14 years; that he attended to the repairs made on the real estate, the collection of the income and reported the same to the beneficiaries of said trust satisfactorily to them as well as to his sister Mrs. Scully, during her lifetime.

two parties - then dealing with a subject-matter outside of the trustee relationship - from entering into a joint agreement such as defendant's Exhibit 1, (which was a contract knowingly entered into with the Peoples Trust & Savings Bank of Chicago) in the absence of any evidence showing that Mrs. Goolly was imposed upon. The testimony

shows that this account was opened for the convenience of both parties, and as before stated, in the absence of any evidence of imposition or inability to enter into a contract, we do not think this fund can be followed and still be construed as trustee funds when, after it was allocated or paid to Mrs. Goolly, it was voluntarily placed in the bank under a relationship which was perfectly legal and was done without any fraudulent intent. Smith v. Smith, 283 Ill. 3; Illinois Tr. & Sav. Bank v. Van Vleet, 310 Ill. 185.

Defendants next contend that the fees retained by the plaintiff as compensation for his work as trustee are not justified. There can be no rigid rule for the fixing of fees or compensation to be paid a trustee, as each case is different and must be controlled by its own facts and circumstances. Much depends upon the nature of the trust and the fund or property and the amount of work done relative thereto and the result thereof. The evidence shows that in this case, at the conclusion of plaintiff's services as executor, he took over the work as trustee; that the property consisted of real estate which he sold advantageously and invested the money in bonds which produced an income; that the balance of the property consisted of real estate which he leased at an advantageous figure for a period of 99 years; that the time consumed in doing this work extended over a period of approximately 14 years; that he attended to the receipts made on the real estate, the collection of the income and reported the same to the beneficiaries of said trust satisfactorily to them as well as to his sister Mrs. Goolly, during her lifetime.

The evidence further shows that during the time he managed these affairs he handled approximately \$190,000; that he frequently, if not daily, had conferences with some of the interested parties in and about said estate; that the fees which he claims amount to approximately 2 1/2 per cent of the money involved, or about \$300 a year during the period covered by his trusteeship.

From the facts and circumstances before us we do not find that the plaintiff Baker has been other than faithful to his trust and we believe that he should receive reasonable compensation for the work performed.

In Follansbee v. Outhet, 182 Ill. App. 213, the court in determining the amount of compensation of a trustee should receive for his services, at page 216, said:

"The compensation of a trustee is not determined by any established practice or rule, but in determining such compensation the responsibility incurred, the amount of the estate, the time and labor properly devoted by the trustee to the discharge of his duties are to be considered. What is reasonable compensation depends largely on the circumstances of each case."

In Dunne v. Cooke, 231 Ill. App. 281, the same rule was adopted for determining the amount to be allowed as compensation. In that case the court approved an allowance of \$9,000 as commission to the sole surviving trustee out of an estate of \$165,000, as well as \$7,500 for his solicitor. In the case at bar no solicitor's fees are asked. We cannot see that any injustice is being done to any of the interested parties to this suit in compensating the trustee, plaintiff herein, for the successful work which he performed and we think his request for fees is modest. We further believe that the court should have overruled the exceptions to the master's report and allowed to said plaintiff the amount remaining in the joint account held by plaintiff and his sister which was in the bank at the time of her death, as well as to allow the plaintiff the reasonable compensation which he asked as trustee of said estate.

The evidence further shows that during the time he managed these affairs he handled approximately \$180,000; that he frequently, if not daily, had conferences with some of the interested parties in and about said estate; that the fees which he claims amount to approximately 8 1/2 per cent of the money involved, or about \$300 a year during the period covered by his trusteeship.

From the facts and circumstances before us we do not find that the plaintiff Baker has been other than faithful to his trust and we believe that he should receive reasonable compensation for the work performed.

In Polansky v. Oshesky, 183 Ill. App. 313, the court in determining the amount of compensation of a trustee should receive for his services, at page 316, said:

"The compensation of a trustee is not determined by any established practice or rule, but in determining such compensation the responsibility incurred, the amount of the estate, the time and labor properly devoted by the trustee to the discharge of his duties are to be considered. What is reasonable compensation depends largely on the circumstances of each case."

In Turner v. Cook, 211 Ill. App. 381, the same rule was adopted for determining the amount to be allowed as compensation. In that case the court approved an allowance of \$2,000 as compensation to the sole surviving trustee out of an estate of \$85,000, as well as \$7,500 for his solicitor. In the case at bar no solicitor's fees are asked. We cannot see that any injustice is being done to any of the interested parties to this suit in compensating the trustee, plaintiff herein, for the successful work which he performed and we think his request for fees is modest. We further believe that the court should have overruled the exceptions to the master's report and allowed to said plaintiff the amount remaining in the joint account held by plaintiff and his sister which was in the bank at the time of her death, as well as to allow the plaintiff the reasonable compensation which he asked as trustee of said estate.

For the reasons herein given the decree of the Circuit Court is reversed and the cause is remanded with directions to overrule the exceptions to the master's report and enter a decree as recommended by the master and in harmony with the views set forth in this opinion.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HEBEL AND HALL, JJ. CONCUR.

For the reasons herein given the decree of the Circuit Court is reversed and the cause is remanded with directions to overrule the exceptions to the master's report and enter a decree as recommended by the master and in harmony with the views set forth in this opinion.

DECEMBER 1, 1904. AND OTHER REASONS
WITH DIRECTIONS.

HEBEL AND HALL, JJ. CONCUR.

39257

IRENE KRIZA,

Appellee,

v.

EDWARD H. FAGAN,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

291 I.A. 610¹

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from a judgment entered in the Superior Court in the sum of \$300 in favor of the plaintiff, Irene Kriza, in a personal injury suit for damages claimed to have been sustained by her when she fell from a window of an apartment building owned by the defendant, Edward H. Fagan.

The plaintiff was employed as a maid by one of the tenants of the building and while engaged in washing one of the windows of the first floor apartment in said building where her employer resided, she fell a distance of about 12 feet, sustaining the injuries of which she complains.

The declaration consisted of two counts, the first of which alleges that the defendant then and there, wholly failing in said duty, carelessly and negligently permitted and allowed certain moldings and casements, enclosing various windows in said building, to become and remain in a dangerous, rotten, unsafe and loose condition, and carelessly and negligently failed to make its dangerous condition known to the plaintiff, although defendant had notice of its dangerous and unsafe condition, or by the exercise of ordinary care, should have known of said condition; that plaintiff had no knowledge of the dangerous, decayed, unsafe and loose condition of said moldings, sashes and casements enclosing said windows and that she was at all times in the exercise of due care and caution for her own safety; that while plaintiff was seated on one of the

IRENE KRISA,

Appellee,

v.

EDWARD H. TEGAN,

Appellant.

SUPERIOR COURT

DOCK COUNTY.

Settled

MR. PRESIDING JUDGE OWEN E. BULLOCK DELIVERED THE

OPINION OF THE COURT.

This is an appeal from a judgment entered in the Superior Court in the sum of \$300 in favor of the plaintiff, Irene Kriza, in a personal injury suit for damages claimed to have been sustained by her when she fell from a window of an apartment building owned by the defendant, Edward H. Tegan.

The plaintiff was employed as a maid by one of the tenants of the building and while engaged in washing one of the windows of the first floor apartment in said building where her employer resided, she fell a distance of about 12 feet, sustaining the injuries of which she complains.

The declaration consisted of two counts, the first of which alleges that the defendant then and there, wholly failing in said duty, carelessly and negligently permitted and allowed certain moldings and casements, enclosing various windows in said building, to become and remain in a dangerous, rotten, unsafe and loose condition, and carelessly and negligently failed to make its dangerous condition known to the plaintiff, although defendant had notice of its dangerous and unsafe condition, or by the exercise of ordinary care, should have known of said condition; that plaintiff had no knowledge of the dangerous, decayed, unsafe and loose condition of said moldings, sashes and casements enclosing said window and that she was at all times in the exercise of due care and caution for her own safety; that while plaintiff was seated on one of the

window sills, washing one of said windows and while supporting herself on said window frame with one hand, and while in the exercise of due care and caution for her own safety, the window which the said plaintiff was washing, by reason of the dangerous and loose condition of said moldings, sashes and casements encasing said window began to vibrate and became loose and dangerous, and by reason thereof the plaintiff lost her grip of said window, and was thrown and fell from said window a great distance to the ground, etc.

Count 1 further alleges that by reason thereof and by reason of the carelessness and negligence of defendant, as aforesaid, plaintiff's hands, wrists, feet, legs, arms, shoulders and spinal column were then and there fractured and broken, causing injuries of a permanent and lasting nature, and the plaintiff's body was greatly crushed, bruised, lacerated and injured, both internally and externally, and she became therefrom sick, sore, lame and disordered for the remainder of her life, during all of which the plaintiff has suffered and will suffer great pain, and has been and will be prevented from attending to her usual and ordinary affairs, and duties, and has lost and will lose divers great gains and profits she would otherwise have made and acquired, and has paid, laid out and expended, and will be compelled to pay out, pay and expend divers large sums of money in and about endeavoring to be healed and cured of her hurts, bruises and wounds, lacerations, fractures and injuries, received as aforesaid.

Count 2 is practically the same as count 1 except that it is alleged that by reason of defendant's negligence and carelessness in permitting said molding, sashes and casements encasing said window to remain in a dangerous, rotted, unsafe and loose condition, the window began to vibrate and shake, and the plaintiff, by reason thereof became alarmed and in fear of her life, endeavored to grasp a more secure object, and by reason thereof, lost her grip upon said

window sills, washing one of said windows and while supporting herself on said window frame with one hand, and while in the exercise of due care and caution for her own safety, the window which the said plaintiff was washing, by reason of the dangerous and loose condition of said molding, sashes and casements enclosing said window began to vibrate and become loose and dangerous, and by reason thereof the plaintiff lost her grip of said window, and was thrown and fell from said window a great distance to the ground, etc.

Count 1 further alleges that by reason thereof and by

reason of the carelessness and negligence of defendant, as aforesaid, plaintiff's hands, wrists, feet, legs, arms, shoulders and spinal column were then and there fractured and broken, causing injuries of a permanent and lasting nature, and the plaintiff's body was greatly lacerated, bruised, lacerated and injured, both internally and externally, and she became thereafter sick, sore, lame and disordered for the remainder of her life, during all of which the plaintiff has suffered and will suffer great pain, and has been and will be prevented from attending to her usual and ordinary affairs, and duties, and has lost and will lose divers great pains and profits and would otherwise have made and acquired, and has paid, laid out and expended, and will be compelled to pay out, pay and expend divers large sums of money in and about endeavoring to be healed and cured of her hurts, bruises and wounds, lacerations, fractures and injuries, received as aforesaid.

Count 2 is practically the same as Count 1 except that it is alleged that by reason of defendant's negligence and carelessness in permitting said molding, sashes and casements enclosing said window to remain in a dangerous, rotten, unsafe and loose condition, the window began to vibrate and shake, and the plaintiff, by reason thereof became alarmed and in fear of her life, endeavored to grasp a more secure object, and by reason thereof, lost her grip upon said

window, and by reason thereof and by reason of the premises aforesaid, plaintiff fell from said window casement a great distance to the ground.

Plaintiff on direct examination testified in part as follows:

" * * * I was told to do the windows, and I was washing the bedroom window. I had the inside washed. I sat out to do the outside. I got on the outside by pulling the bottom window up and sat out. And I was going to pull down the top and wash it. It stuck there a little bit, so I put a little more pressure on it and it came down with such unexpected force. It hit me on the chest and screaming with pain, I fell back. I fell out into the alleyway."

On cross-examination plaintiff testified in part as follows:

" * * * After I got outside the window and sat on the ledge, I raised the lower window away up to the top, then reached up with right hand to pull window down and it stuck.

Q. And you pulled harder? A. Yes.

Q. And the window came down? A. That is right.

Q. And you fell out, is that right? A. That is right.

* * * * *

Q. Now, when you were sitting on this outside ledge, and you reached up to pull this upper window down, where was your left hand? A. Holding on to the window.

I have washed windows in other buildings, but had never found that a window stuck at the time I went to pull it down. This was in January, but I do not recall whether it was a cold day. When I reached up to pull the window down it stuck real hard.

Q. Because it stuck, you pulled real hard, is that right? A. Yes.

I expected the window to come down, but not as fast as it did. The window did not come out of the casing and fall with me. I don't recall that any portion of the casing or the window fell out. No portion of the window that I had hold of came loose from the rest of the window. My chest was hit by the window when it came down. I don't recall whether the window hit either one of my arms. * * *

One has but to read the plaintiff's testimony to become convinced that the proximate cause of the accident was the action of the plaintiff in putting herself in a position of danger by pulling the window down upon her so that she became overbalanced and fell. The allegation in the declaration is that the defendant "allowed certain moldings and casements, encasing various windows in said

plaintiff fell from said window easement a great distance to the ground, and by reason thereof and by reason of the premises aforesaid,

Plaintiff on direct examination testified in part as follows:

" * * * I was told to do the window, and I was leaning the bedroom window. I had the inside reached. I got out to do the outside. I got on the outside by pulling the bottom window up and set out. And I was going to pull down the top and wash it. It struck there a little bit, so I put a little more pressure on it and it came down with such unexpected force. It hit me on the chest and forearm, with rain, I fell back. I fell into the alleyway."

On cross-examination plaintiff testified in part as follows:

" * * * After I got outside the window and set on the ledge, I raised the lower window away up to the top, then reached up with right hand to pull window down and it struck. Q. And you pulled harder? A. Yes. Q. And the window came down? A. That is right. Q. And you fell out, is that right? A. That is right."

Q. Now, when you were sitting on this outside ledge, and you reached up to pull this window down, where was your left hand? A. Holding on to the window. I have window windows in other buildings, but had never found that a window struck at the time I went to pull it down. This was in January, but I do not recall whether it was a cold day. When I reached up to pull the window down it struck me hard. Q. Because it struck, you pulled real hard, is that right? A. Yes.

I expected the window to come down, but not as fast as it did. The window did not come out of the ceiling and fall into me. I don't recall that any portion of the ceiling or the window fell out. No portion of the window that I had hold of came loose from the rest of the window. I don't recall whether the window window when it came down, I don't recall whether the window hit either one of my arms."

One has but to read the plaintiff's testimony to become

convinced that the proximate cause of the accident was the action of the plaintiff in putting herself in a position of danger by pulling the window down upon her so that she became overbalanced and fell. The allegation in the declaration is that the defendant allowed certain moldings and easements, enclosing various windows in said

building, to become and remain in a dangerous, rotten, unsafe and loose condition". There is no testimony offered which even tends to support this allegation. The plaintiff herself testified that no part of the casing or window came loose, but she did testify to the effect that the window was tight and she had to pull rather hard in order to pull it down.

We are of the opinion that the trial court erred in not sustaining defendant's motion to direct a verdict in this case. Points are made that the premises were not under the control of the defendant as the same had been leased to plaintiff's employer and, by the terms of said lease, it was the duty of the tenant to keep the premises in a safe condition. However, it will be unnecessary to discuss this latter point for the reason heretofore stated that plaintiff has failed to sustain by the manifest weight of the evidence the allegations as set forth in her declaration and each count thereof.

For the reasons herein given the judgment of the Superior Court is hereby reversed.

JUDGMENT REVERSED.

HEBEL AND HALL, JJ. CONCUR.

building, to become and remain in a dangerous, rotten, unsafe and loose condition". There is no testimony offered which even tends to support this allegation. The plaintiff herself testified that no part of the casing or window came loose, but she did testify to the effect that the window was tight and she had to pull rather hard in order to pull it down.

We are of the opinion that the trial court erred in not sustaining defendant's motion to direct a verdict in this case. Points are made that the premises were not under the control of the defendant as the same had been leased to plaintiff's employer and, by the terms of said lease, it was the duty of the tenant to keep the premises in a safe condition. However, it will be unnecessary to discuss this latter point for the reason heretofore stated that plaintiff has failed to sustain by the manifest weight of the evidence the allegations as set forth in her declaration and each count thereof. For the reasons herein given the judgment of the Superior Court is hereby reversed.

JULIUS E. WOOD.

HEBBI AND PAUL, JJ. CONCUR.

39272

DAVID MILLER,

Appellee,

v.

JACOB GOMBERG,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

291 I.A. 610²

MR. PRESIDING JUSTICE DENIS E. SULLIVAN DELIVERED THE
OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court reinstating a cause on the trial calendar which had previously been nonsuited for want of prosecution. The suit was brought to recover on two notes, one for \$800 and the other for \$100. On April 9, 1936, the suit was dismissed at plaintiff's costs for want of prosecution, which did not determine the merits of the suit, and on June 18, 1936, the said order of dismissal was vacated by the court upon a petition by the plaintiff. The plaintiff David Miller, appellee herein, has not appeared or filed any brief in this court.

The vacating of the order of dismissal and the reinstatement of this cause by the Municipal Court was based upon a petition by plaintiff which does not allege any equitable grounds for setting aside the order of dismissal. The petition merely alleged certain facts showing that the attorney for the plaintiff was not present when the cause was reached for trial, but gave no equitable or legal reason for his absence. Seventy days intervened between the time of the dismissal of the suit for want of prosecution and the application for reinstatement.

The Municipal Court Act, Chap. 37, Par. 409, Sec. 21, provides that judgments, orders or decrees will not be vacated or set aside after 30 days, unless the petition for the same sets "forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity."

DAVID MILLER,

appellee,

v.

JACOB COLEMAN,

appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

291 I.A. 610

MR. PRESIDING JUDGE JAMES E. SMITH, CHIEF CLERK

OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court reinstating a cause on the trial calendar which had previously been non-suited for want of prosecution. The suit was brought to recover on two notes, one for \$800 and the other for \$100. On April 8, 1936, the suit was dismissed at plaintiff's costs for want of prosecution, which did not determine the merits of the suit, and on June 18, 1936, the said order of dismissal was vacated by the court upon a petition by the plaintiff. The plaintiff David Miller, appellee herein, has not appeared or filed any brief in this court.

The granting of the order of dismissal and the reinstatement of this cause by the Municipal Court was based upon a petition by plaintiff which does not allege any equitable grounds for setting aside the order of dismissal. The petition merely alleged certain facts showing that the attorney for the plaintiff was not present when the cause was reached for trial, but gave no equitable or legal reason for his absence. Seventy days intervened between the time of the dismissal of the suit for want of prosecution and the application for reinstatement.

The Municipal Court Act, Chas. 37, Sec. 408, 409, 410, provides that judgments, orders or decrees will not be vacated or set aside after 30 days, unless the petition for the same sets "forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity."

In the case of Bertha M. Doyle v. Samuel Fallows, et al.,

207 Ill. App. 5, at page 6, it is said:

"A proceeding in the Municipal Court of Chicago by petition to vacate a judgment by default is in the nature of a bill in equity. * * * Equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmixed with fault or negligence on his own part."

As we have already stated, the petition in this case does not allege any fraud on the part of the defendant. No diligence is shown on the part of the plaintiff in said petition, or "accident or mistake alleged therein which was unmixed with his own fault or negligence". We do not think, therefore, the petition was a sufficient one upon which the court should have based its action.

For the reasons herein given the order of June 18, 1936, vacating the prior order of dismissal, is hereby reversed.

ORDER REVERSED.

HEBEL AND HALL, JJ. CONCUR.

In the case of Bethna M. Boyle v. Samuel Walters, et al.

307 Ill. App. 5, at page 6, it is said:

"A proceeding in the Municipal Court of Chicago by petition to vacate a judgment by default is in the nature of a bill in equity. * * * Equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unminged with fault or negligence on his own part."

As we have already stated, the petition in this case does

not allege any fraud on the part of the defendant. No diligence is shown on the part of the plaintiff in said petition, or "accident or mistake alleged therein which was unminged with his own fault or negligence". We do not think, therefore, the petition was sufficient one upon which the court should have based its action. For the reasons herein given the order of June 16, 1916, vacating the prior order of dismissal, is hereby reversed.

ORDER REVERSED.

HERBELL AND HALL, JJ. CONCUR.

38960

MAX FELDGREBER, et al.,

Appellants,

v.

LIBERTY TRUST & SAVINGS BANK, etc., et al.,
(Defendants below),

LIBERTY NATIONAL BANK OF CHICAGO,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

291 I.A. 610³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County dismissing the amended bill of complaint filed in the above entitled cause.

On April 18th, 1936, Max Feldgreber and Morris Feldgreber, "individually, and in a representative capacity, on behalf of all depositing and non-depositing bondholders of the bond issue of the Mason-Roosevelt Block," filed a bill of complaint against the Liberty Trust & Savings Bank, a corporation, Liberty National Bank of Chicago, a corporation, Jack A. Diamond and Mason-Roosevelt Building Corporation, a corporation, consisting of two "counts".

The first "count" is described as "an equitable cause of action", in which the complainants pray that a trial by jury be had upon the issues presented. In this first "count", plaintiffs allege that they are the personal owners of bonds in the sum of \$2,500.00, part of a first mortgage bond issue aggregating \$300,000.00, underwritten by the Liberty Trust & Savings Bank, as trustee, secured by a trust deed on the premises described as the Mason-Roosevelt Block, having an income of \$25,000.00 per year, and that defendants had conspired to obtain ownership and control of the property by fraud. It is further alleged that on July 15th, 1927, the trust deed conveying the premises was executed by the makers of the bonds to the Liberty Trust & Savings Bank, as trustee, to secure payment of the bonds, and

MAX WEIDENFELD, et al.,

Appellants,

v.

LIBERTY TRUST & SAVINGS BANK, etc., et al.,
(Defendants below)

LIBERTY NATIONAL BANK OF CHICAGO,

appellees.

COURT OF APPEALS

COOK COUNTY,

2211 A. 310

BY JUSTICE WILLIAM H. HARRIS, CHIEF OF THE COURT.

This is an appeal from an order of the Superior Court of

Cook County dismissing the amended bill of complaint filed in the

above entitled cause.

On April 18th, 1936, Max Weidenfeld and Morris Feldberger,

"individually, and in a representative capacity, on behalf of all

depositing and non-depositing bondholders of the bond issue of the

Nelson-Roosevelt Block," filed a bill of complaint against the

Liberty Trust & Savings Bank, a corporation, Liberty National Bank

of Chicago, a corporation, Jack A. Diamond and Nelson-Roosevelt Building

Corporation, a corporation, consisting of two "counts".

The first "count" is described as "an equitable cause of

action", in which the complainants pray that a trial by jury be had

upon the issues presented. In this first "count", plaintiffs allege

that they are the personal owners of bonds in the sum of \$2,500.00,

part of a first mortgage bond issue representing \$200,000.00, under-

written by the Liberty Trust & Savings Bank, as trustee, secured by

a trust deed on the premises described as the Nelson-Roosevelt Block,

having an income of \$2,500.00 per year, and that defendants had

conspired to obtain ownership and control of the property by fraud.

It is further alleged that on July 15th, 1937, the trust deed conveying

the premises was executed by the makers of the bonds to the Liberty

Trust & Savings Bank, as trustee, to secure payment of the bonds, and

that the bonds by their terms, were made payable at the office of the trustee, and that the trust deed has never been released of record; that during 1933, a reorganization of the Liberty Trust & Savings Bank occurred, and that the Liberty National Bank of Chicago took over the assets and liabilities of the Liberty Trust & Savings Bank; that pursuant to a conspiracy, and on April 6th, 1935, the Mason-Roosevelt Building Corporation was incorporated with a capitalization of 1875 shares, no par value; that on April 27th, 1935, title to the premises was conveyed to this corporation; that the manner and purpose of the incorporation were fraudulent in that the original incorporators, Jack A. Diamond, Jerome S. Greenberg, Eugene Nirdlinger and Carl S. Goodman were licensed attorneys and members of the firm of Wilhartz, Hirsch & Schanfarber, and counsel for the trustee; that Greenberg was the first secretary of the corporation, and that the present secretary is Alexander H. Miller, an attorney and officer of the trustee bank, and that Miller occupied offices in the same building as that occupied by the trustee bank for the sole purpose of concealing certain fraudulent manipulations; that no independent bondholder or stockholder was represented in the corporation; that certain shares or certificates in the corporation were fraudulently issued to agents of the trustee; that the trustee was the actual owner of the premises after the incorporation, that the corporation and trustee are in reality, one, and that the officers and directors of the building corporation conspired to obtain the property of the trustee. It is also alleged that in pursuance of the conspiracy, the trustee acquired the ownership of the property in a fraudulent manner, employed agents to repurchase all outstanding bonds and certificates, furnishing the agents with names and addresses of the holders thereof, and that all of this was done in collusion with the officers of the corporation; that a certain person named Meyers, a licensed attorney and officer of the trustee bank, one Springer and others, were agents for the purpose aforesaid, and that these

that the bonds by their terms, were made payable at the office of the trustee, and that the trust fund has never been released of record; that during 1935, a reorganization of the Liberty Trust & Savings Bank occurred, and that the Liberty National Bank of Chicago took over the assets and liabilities of the Liberty Trust & Savings Bank; that pursuant to a conspiracy, and on April 6th, 1935, the Mason-Roosevelt Building Corporation was incorporated with a capitalization of \$250,000, no par value; that on April 7th, 1935, title to the premises was conveyed to this corporation; that the manner and purpose of the incorporation were fraudulent in that the original incorporators, Jack A. Diamond, Jerome S. Greenberg, Eugene Klinger and Carl J. Goodman were licensed attorneys and members of the firm of Wilbur, Kirsh & Schenck, and counsel for the trustee; that Greenberg was the first secretary of the corporation, and that the present secretary is Alexander H. Miller, an attorney and officer of the trustee bank, and that Miller occupied offices in the same building as that occupied by the trustee bank for the sole purpose of concealing certain fraudulent manipulations; that no independent bondholder or stockholder was represented in the corporation; that certain shares or certificates in the corporation were fraudulently issued to agents of the trustee; that the trustee was the actual owner of the premises after the incorporation, that the corporation and trustee are in reality, one, and that the officers and directors of the building corporation conspired to obtain the property of the trustee. It is also alleged that in pursuance of the conspiracy, the trustee collected the ownership of the property in a fraudulent manner, employed agents to repurchase all outstanding bonds and certificates, furnishing the agents with names and addresses of the holders thereof, and that all of this was done in collusion with the officers of the corporation; that a certain person named Meyers, a licensed attorney and officer of the trustee bank, one Klinger and others, were agents for the purpose aforesaid, and that these

agents have repurchased bonds and certificates on behalf of the trustee aggregating \$153,000.00 or more from the bondholders thereof. It is also alleged that pursuant to this conspiracy, on or about April 1st, 1935, the trustee, in collusion with the officers and directors of the corporation, procured a purchaser for the property, and a contract of sale for the sum of \$112,500.00, and that a contract for sale of the property for the sum of \$112,500.00 was entered into; that the trustees concealed the knowledge of the sale from the holders of the bonds or certificates, and that consummation of this sale was to take place in March or April, 1936, and that the trustee repurchased \$153,000.00 of this bond issue prior to the consummation of this sale; that on April 1st, 1935, certain agents of the trustee and of the building corporation repurchased bonds issued on the Mason-Roosevelt Block on behalf of the trustee at the rate of 5 to 10% of their face value; that the agents repurchased the certificates on the Mason-Roosevelt Block on behalf of the trustee at the rate of 25 to 35% of their face value, and that the agents concealed all knowledge from the holders of the bonds or certificates of the secret sale of the property by the trustee, as hereinbefore set forth; that the agents were able to repurchase the securities at nominal prices by fraudulent representations to the holders thereof; that the agents induced holders of the securities to accompany them to the banking quarters of the trustee, where the various sales to the trustee took place, and that in this fraudulent manner, the house of issue, the Liberty Trust & Savings Bank, acquired the ownership of \$153,000.00 of its own bonds; that the trustee is the present owner of the legal and equitable title to the Mason-Roosevelt Block, and that the trustee is about to consummate the sale of the premises for the sum of \$112,500.00, which sum it now has in its possession, and that

agents have purchased bonds and certificates on behalf of the trustee corporation, paying \$115,000.00 or more from the bondholders thereof. It is also alleged that pursuant to this conspiracy, on or about April 1st, 1935, the trustee, in collusion with the officers and directors of the corporation, procured a purchase order for the property, and a contract of sale for the same at \$115,000.00, and that a contract for sale of the property for the sum of \$115,000.00 was entered into; that the trustee concealed the knowledge of the sale from the holders of the bonds or certificates, and that consummation of this sale was to take place in March or April, 1935, and that the trustee repurchased \$157,000.00 of this bond issue prior to the consummation of this sale; that on April 1st, 1935, certain agents of the trustee and of the building corporation repurchased bonds issued on the Mason-Roosevelt block on behalf of the trustee at the rate of 5 to 10% of their face value; that the agents repurchased the certificates on the Mason-Roosevelt block on behalf of the trustee at the rate of 25 to 50% of their face value, and that the agents concealed all knowledge from the holders of the bonds or certificates of the secret sale of the property by the trustee, as hereinbefore set forth; that the agents were able to repurchase the securities at nominal prices by fraudulent representations to the holders thereof; that the agents induced holders of the securities to accompany them to the building offices of the trustee, where the various sales to the trustee took place, and that in this fraudulent manner, the house of issue, the Liberty Trust & Savings Bank, secured the ownership of \$157,000.00 of its own bonds; that the trustee as the present owner of the legal and equitable title to the Mason-Roosevelt block, and that the trustee is about to consummate the sale of the premises for the sum of \$115,000.00, which sum it now has in its possession, and that

it thereupon will retain this amount of money for its own private use and benefit; that the trustee has violated its duty as trustee in acquiring the subject matter of the trust, and has taken a dishonest advantage of its fiduciary capacity by making a secret profit; that since April 1st, 1935, the trustee has collected for its benefit the sum of \$25,000.00, for which it has never accounted, and it is charged that the trustee will continue to collect income from the premises for its personal use and benefit. In this count it is prayed that a money decree be entered against the Liberty Trust & Savings Bank, Mason-Roosevelt Building Corporation, Jack A. Diamond and each of them, for the sum of \$150,000.00; that a constructive trust be decreed and established for and on behalf of the bond and certificate holders in the Mason-Roosevelt Block; that the trustee furnish a full and complete accounting and distribution for the period commencing April 1st, 1935, to the date of the filing of the bill, and that the trustee be removed and discharged as trustee of the premises, and that a receiver be appointed. It is also prayed that an injunction issue to restrain the trustee from selling the property for the sum of \$112,500.00, or that in the event the sale has already been consummated, that the said sum, when received, be held in trust for the benefit of the bond and certificate holders.

"Count" two of this bill of complaint is denominated an action at law. In this count, it is charged that in the year 1925, plaintiffs opened savings accounts with the Liberty Trust & Savings Bank, and that during 1925, 1926 and 1927 received circulars from the bank offering securities for sale, and that in 1927 the plaintiffs were induced by the bank to transfer their savings into special accounts to be used for the purpose of purchasing bonds; that on January 24th, 1928, the plaintiff, Max Feldgreber, purchased from the bank three bonds, each in the sum of \$500.00, and that on November 18th, 1929, the plaintiff, Morris Feldgreber, purchased a bond for

it thereupon will retain this amount of money for its own private use and benefit; that the trustee has violated its duty as trustee in securing the subject matter of the trust, and has taken a dishonest advantage of its fiduciary capacity by taking a secret profit; that since April 1st, 1935, the trustee has collected for its benefit the sum of \$2,000.00, for which it has never accounted, and it is charged that the trustee will continue to collect income from the premises for its personal use and benefit. In this count it is prayed that a money decree be entered against the liberty trust Savings Bank, Mason-Roosevelt Building Corporation, Jack A. Wilson and each of them, for the sum of \$2,000.00; that a constructive trust be decreed and established for and on behalf of the bond and certificate holders in the Mason-Roosevelt Block; that the trustee furnish a full and complete accounting and distribution for the period commencing April 1st, 1935, to the date of the filing of the bill, and that the trustee be removed and discharged as trustee of the premises, and that a receiver be appointed. It is also prayed that an injunction issue to restrain the trustee from selling the property for the sum of \$12,500.00, or that in the event the sale has already been consummated, that the said sum, when received, be held in trust for the benefit of the bond and certificate holders. "Count" two of this bill of complaint is formulated as follows: In this count, it is charged that in the year 1925, plaintiffs opened savings accounts with the Liberty Trust & Savings Bank, and that during 1925, 1926 and 1927 received dividends from the bank offering securities for sale, and that in 1927 the plaintiffs were induced by the bank to transfer their savings into special accounts to be used for the purpose of purchasing bonds; that on January 24th, 1928, the plaintiff, Max Feldberger, purchased from the bank three bonds, each in the sum of \$500.00, and that on November 18th, 1928, the plaintiff, Morris Feldberger, purchased a bond for

the sum of \$1,000.00; that at the time of the purchase of these bonds, the bank represented to the purchaser that the interest on the bonds had been promptly paid, together with general taxes, special assessments and insurance on the property mortgaged for their security. They also charge that the bank represented that the makers of the bonds were solvent, that the income from the property was \$50,000.00 a year, the cost of operation \$20,000.00 a year, and that prior to January 24th, 1928, the bank had sold \$100,000.00 of the bond issue, that prior to November 28th, 1929, had sold \$190,000.00 of the bond issue, and that the said premises were valued between \$325,000.00 and \$350,000.00. It is further alleged that at the time of the purchase by plaintiff of these bonds, the makers had defaulted in interest and principal payments then due, and that the makers of the bonds had defaulted in the payment of the general taxes, special assessments and insurance premiums on the property mortgaged to secure the bonds; that the makers were insolvent; that the value of the premises was not as represented. It is charged that misrepresentations were wilfully made for the purpose of deceiving the plaintiffs, and they pray that judgment be entered against the Liberty Trust & Savings Bank for the sum of \$2,102.50, together with interest. As already stated, upon the motion of defendants, the petition was dismissed. The motion to dismiss is as follows:

"Motion of Liberty National Bank of Chicago, one of the defendants, dated April 22, 1936, to dismiss the second amended complaint on the ground that plaintiffs demanded trial by jury for their equitable cause of action stated in Count I; that the allegations contained in paragraphs 12, 13, 14, 15, 16 and 17 of Count I are immaterial and irrelevant; that plaintiffs are not stockholders in the Mason-Roosevelt Building Corporation, and any act, fraudulent or otherwise, does not concern them; that the allegations contained in paragraph 12 of Count II are immaterial and irrelevant; that plaintiffs are not stockholders in said Corporation, and any act fraudulent or otherwise, does not concern them; and that all the allegations contained in Count II of said complaint fail to state a cause of action against Liberty Trust & Savings Bank, a corporation."

Chapter 110, paragraph 159 of the Practice Act, Illinois State Bar Stats. 1935, provides:

the sum of \$1,000.00; that at the time of the purchase of these bonds, the bank presented to the purchaser that the interest on the bonds had been promptly paid, together with annual taxes, special assessments and insurance on the property mortgaged for their security. They also charge that the bank represented that the makers of the bonds were solvent, that the income from the property was \$2,000.00 a year, the cost of operation \$0,000.00 a year, and that prior to January 24th, 1938, the bank had sold \$100,000.00 of the bond issue, that prior to November 26th, 1939, had sold \$130,000.00 of the bond issue, and that the said premises were valued between \$37,000.00 and \$50,000.00. It is further alleged that at the time of the purchase by plaintiff of these bonds, the makers had defaulted in interest and principal payments then due, and that the makers of the bonds had defaulted in the payment of the annual taxes, special assessments and insurance premiums on the property mortgaged to secure the bonds; that the makers were insolvent; that the value of the premises was not as represented. It is shown that clear payment notes were willfully made for the purpose of deceiving the plaintiff, and they pray that judgment be entered against the Liberty Trust & Savings Bank for the sum of \$2,108.50, together with interest. As already stated, upon the motion of defendant, the motion was dismissed. The motion to dismiss is as follows:

"Motion of Liberty National Bank of Chicago, one of the defendants, dated April 22, 1940, to dismiss the second amended complaint on the ground that plaintiff's demand is barred by laches for their equitable cause of action stated in Count I; that the allegations contained in paragraphs 12, 13, 14, 15 and 17 of Count I are immaterial and irrelevant; that plaintiff's not stockholders in the Mason-Overly Building Corporation, and any not, fraudulent or otherwise, does not concern them; that the allegations contained in paragraph 18 of Count II are immaterial and irrelevant; that plaintiff's not stockholders in said Corporation, and any not, fraudulent or otherwise, does not concern them; and that all the allegations contained in Count II of said complaint fail to state a cause of action against Liberty Trust & Savings Bank, a corporation."

"Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore appertaining to the manner of pleading in such actions respectively, shall hereafter be deemed necessary or appropriate, and there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules adopted pursuant thereto; but this section shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity."

Paragraph 170, sub-section 2 of the same Act, provides:

"No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet."

We are of the opinion that there are some substantial averments in the bill of complaint which should be considered, and that the court was in error in dismissing the complaint. The order is, therefore, reversed and the cause remanded with the direction that the court require the defendants to answer, and that a hearing be had on the issues.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

"Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore pertaining to the manner of pleading in such actions respectively, shall however be deemed necessary or appropriate, and there shall be no distinction respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this act and the rules adopted pursuant thereto; but this section shall not be deemed to affect in any way the substantive elements of any cause of action either at law or in equity."

Paragraph 170, sub-section 2 of the same act, provides:

"No pleading shall be deemed to be in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet."

We are of the opinion that there are some substantial averments in the bill of complaint which should be considered, and that the court was in error in dismissing the complaint. The order is, therefore, reversed and the cause remanded with the direction that the court require the defendants to answer, and that a hearing be had on the issues.

REVEREND AND HONORABLE THE JUDGES.

DEWIS K. BRIDGES, J. CLERK.

38968

CHARLES B. SMITH,

Plaintiff - Appellee,

v.

GORDON C. THORNE and RICHARD E.
SCHMIDT,

Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

291 I.A. 610

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against Gordon C. Thorne and Richard E. Schmidt in an action brought to recover for rent for an apartment alleged to have been occupied by the two defendants. The judgment was entered upon the verdict of a jury. The defendants are the executors of the last will and testament of Katherine C. Thorne, who died April 4th, 1930. On October 1st, 1928, Katherine C. Thorne had leased the premises for a period extending from October 1st, 1928, to December 30th, 1930. She entered into possession of the premises on October 1st, 1928, and remained in such possession until her death, and paid the rent for the same to and including April 30th, 1930.

It is charged in the declaration filed that on April 18th, 1930, the two defendants were appointed executors, and on that date entered into and took possession of the premises and remained in such possession until September 30th, 1930. Prior to the filing of this suit, the plaintiff had filed a claim in the Probate Court of Cook County against the estate of Katherine C. Thorne, in which he claimed that rent was due from the estate for the apartment for the months of May, June and July, 1930, under the lease, and the claim had been allowed for the sum of \$2,520.00. A trial of this cause was formerly had in the Superior Court, and judgment was entered against plaintiff for costs of suit. From that judgment, an appeal was taken to this court and the judgment was reversed and remanded for a new trial.

CHARLES A. SMITH,

Plaintiff - Appellee,

v.

GORDON C. THORNE and RICHARD E. SCHWIDT,
Defendants - Appellants.

2211 A. 610

MR. JUSTICE WILL DENIED THE MOTION AT THE HEARING.

This is an appeal from a judgment against Gordon C. Thorne

and Richard E. Schwidt in an action brought to recover for rent for

an apartment alleged to have been occupied by the two defendants.

The judgment was entered upon the verdict of a jury. The defendants

are the executors of the last will and testament of Katherine G.

Thorne, who died April 4th, 1930. On October 1st, 1928, Katherine

G. Thorne had leased the premises for a period extending from

October 1st, 1928, to December 30th, 1930. She entered into possession

of the premises on October 1st, 1928, and remained in such possession

until her death, and paid the rent for the same to and including

April 30th, 1930.

It is charged in the declaration filed that on April 18th,

1930, the two defendants were appointed executors, and on that date

entered into and took possession of the premises and remained in such

possession until September 30th, 1930. Prior to the filing of this

suit, the plaintiff had filed a claim in the Probate Court of Cook

County against the estate of Katherine G. Thorne, in which he claimed

that rent was due from the estate for the apartment for the months

of May, June and July, 1930, under the lease, and the claim had been

allowed for the sum of \$2,000.00. A trial of this cause was formerly

had in the Superior Court, and judgment was entered against plaintiff

for costs of suit. From that judgment, an appeal was taken to this

court and the judgment was reversed and remanded for a new trial.

This case is reported in 275 Ill. App. 627. This court there held that if the two defendants entered into possession of the apartment and held such possession until the 30th day of September, 1930, as the evidence adduced in that trial indicated that they were liable to plaintiff for rent. In view of the fact that there is considerable difference between the testimony adduced in the former trial and in the last trial, we will recite the substance of the evidence adduced at this trial, as shown by the abstract. The leased premises consisted of fifteen rooms and five baths on one floor of an apartment building, and three rooms - servants quarters - on another floor.

Arthur D. Welton, Jr., a witness offered on behalf of plaintiff, testified that in the month of September or October, 1930, he had a conversation with the defendant Thorne in the courtroom of the Probate Court of Cook County, as follows: "I spoke to Mr. Thorne about the liability upon the lease and Mr. Smith's part in the building, and his reply, I can't state it in exact words, in substance was that the obligation on that lease would be taken care of".

Cross-examination: Q. "There was nothing in your conversation stated about Mr. Thorne personally paying this rent, was there?" A. "There was not in so many words, I will say that."

A witness named Lorenzen testified to the effect that in the spring and summer of 1930 he was employed by the janitor in charge at 3314 Sheridan Road, Chicago, the street number of the apartment in question; that he worked as janitor at this place from March, 1930, until August, 1933; that he was acquainted with Mrs. Katherine C. Thorne, and knew the apartment where she lived; that after her death, he was up in the apartment a number of times and observed some kitchen chairs and kitchen utensils in the kitchen of the apartment on the fifth floor, but that no one was in this apartment at that time.

A witness named Edward W. Von Busch, the night elevator

This case is reported in 273 Ill. App. 527. This court there held that if the two defendants entered into possession of the apartment and held such possession until the 15th day of September, 1930, as the evidence adduced in that trial indicated that they were liable to plaintiff for rent. In view of the fact that there is considerable difference between the testimony adduced in the former trial and in the last trial, we will recite the substance of the evidence adduced at this trial, as shown by the abstract. The leased premises consisted of fifteen rooms and five baths on one floor of an apartment building, and three rooms - servants quarters - on another floor. Arthur D. Nelson, Jr., a witness offered on behalf of plaintiff, testified that in the month of September or October, 1930, he had a conversation with the defendant Thorne in the courtroom of the Probate Court of Cook County, as follows: "I spoke to Mr. Thorne about the liability upon the lease and Mr. Smith's part in the building, and his reply, I can't state it in exact words, in substance was that the obligation on that lease would be taken care of." Cross-examination: Q. "There was nothing in your conversation stated about Mr. Thorne personally paying this rent, was there?" A. "There was not in so many words, I will say that." A witness named Lorenson testified to the effect that in the spring and summer of 1930 he was employed by the janitor in charge at 331 E. Madison Road, Chicago, the street number of the apartment in question; that he worked as janitor at this place from March, 1930, until August, 1931; that he was acquainted with Mrs. Katherine G. Thorne, and knew the apartment where she lived; that after her death, he was in the apartment a number of times and observed some kitchen chairs and kitchen utensils in the kitchen of the apartment on the fifth floor, but that no one was in this apartment at that time. A witness named Edward E. Von Busch, the night elevator

operator in the apartment building, testified to the effect that he recalled the death of Mrs. Thorne; that in the summer months of 1930, he saw Dinah Lowe, the laundress for Mrs. Thorne in her lifetime going into the apartment, and that the servants used the rooms on the second floor, and that neither Mr. Schmidt nor Mr. Thorne lived in the building after Mrs. Thorne's death.

Marie Dinah Lowe testified that she was employed by Katherine O. Thorne for seventeen years; that she worked for Mrs. Thorne at the time of her death; that she occupied a room on the second floor of the apartment building during Mrs. Thorne's lifetime; that after the death of Mrs. Thorne, she lived in the same room until one day before October 1st, that she was not there continuously, but that she kept her belongings there; that she knew Elizabeth Gannon, who had formerly been a waitress for Mrs. Thorne, and that at the time of Mrs. Thorne's death, Elizabeth Gannon was Mrs. Thorne's cook; that Elizabeth Gannon occupied a room next to that of the witness, but that she did not think that Elizabeth Gannon remained in that room after Mrs. Thorne's death, but that she left very soon after that. This witness further testified to the effect that after Mrs. Thorne's death, "I was still working there, then I was dismissed", and that she saw the dining room furniture in the apartment for a short time after Mrs. Thorne's death, but that a short time thereafter it was taken out; that after Mrs. Thorne's death, she did not go up to the apartment often. This witness testified that after Mrs. Thorne's death, she asked Mr. Thorne about her remaining in the apartment and if she could keep her room, and that he replied: "Yes, you can keep it until October 1st. It was paid rent anyway." This witness also testified that Mr. Thorne did not live there before his mother's death, nor after, and that Mr. Schmidt never lived there; that after Mrs. Thorne's death, she received no salary, and that she was not working for anybody; that her wages were paid up until May 1st, and that after Mrs. Thorne's death she occupied one of the servant's rooms until October

operator in the apartment building, testified to the effect that he recalled the death of Mrs. Thorne; that in the summer month of 1920, he saw Miss Love, the landlady, for Mrs. Thorne in his lifetime going into the apartment, and that she afterwards used the room on the second floor, and that neither Mr. Schmidt nor Mr. Thorne lived in the building after Mrs. Thorne's death.

Miss Love testified that she was employed by Katherine G. Thorne for seventeen years; that she worked for Mrs. Thorne at the time of her death; that she occupied a room on the second floor of the apartment building during Mrs. Thorne's lifetime; that after the death of Mrs. Thorne, she lived in the same room until one day before October 1st, that she was not there continuously, but that she kept her belongings there; that she knew Elizabeth Cannon, who had formerly been a waitress for Mrs. Thorne, and that at the time of Mrs. Thorne's death, Elizabeth Cannon was Mrs. Thorne's cook; that Elizabeth Cannon occupied a room next to that of the witness, but that she did not think that Elizabeth Cannon remained in that room after Mrs. Thorne's death, but that she left very soon after that. This witness further testified to the effect that after Mrs. Thorne's death, "I was still working there, then I was dismissed", and that she saw the dining room furniture in the apartment for a short time after Mrs. Thorne's death, but that a short time thereafter it was taken out; that after Mrs. Thorne's death, she did not go up to the apartment often. This witness testified that after Mrs. Thorne's death, she asked Mr. Thorne about her belongings in the apartment and if he could keep her room, and that he replied: "Yes, you can keep it until October 1st. It was paid rent anyway." This witness also testified that Mr. Thorne did not live there before his mother's death, nor after, and that Mr. Schmidt never lived there; that after Mrs. Thorne's death, she received no salary, and that she was not working for any body; that her wages were paid up until May 1st, and that after Mrs. Thorne's death she occupied one of the apartment's rooms until October

1st, but was out of the city most of the time.

H. B. Borlum, the janitor of the building in which the apartment in question is located, testified that Mrs. Thorne occupied the third apartment in the building, consisting of sixteen rooms, and that she had three rooms on the second floor for servants, and one for a storeroom; that after Mrs. Thorne's death, he was in the apartment once or twice a week, and that up until October 1st, 1930, Dinah Lowe had a room on the second floor, and that Elizabeth Cannon was there nearly all summer, mostly nights; that the last named person was working for Gordon C. Thorne; that the dining room furniture was one of the last things to be moved out; that during the summer months the furniture and fixtures had been taken away from the living room; that there was one room called, "Gordon Thorne room", which contained nearly all the furniture, the last of which was moved out about October 4th. On cross-examination, he stated that he fixed the date when the last furniture was moved out, from being told that the lease expired on October 1st. This witness also testified that the defendant Schmidt came up after Mrs. Thorne's death with a letter from Mr. Lindahl, the agent of the building, with a request that he, Schmidt, be allowed into the apartment; that this was the latter part of the summer.

Edward J. Lindahl, a real estate agent who had charge of the leasing of the premises in question to Mrs. Thorne, on the part of his employer, testified that the apartment occupied by Mrs. Thorne consisted of fifteen rooms and five baths; that in addition to the apartment, there were three rooms on another floor, which were rented at \$40.00 per month to Mrs. Thorne, as servants quarters; that he was familiar with the rentals usually and customarily paid in a building of the character of the one in question in the city of Chicago during the months of May, June, July and August, 1930, and that a fair rental for the premises at that time was \$800.00 per month for the apartment

lat, but was out of the city most of the time.

M. S. Holmes, the janitor of the building in which the

apartment in question is located, testified that Mrs. Thorne occupied

the third apartment in the building, consisting of sixteen rooms,

and that she had three rooms on the second floor for servants, and

one for a storeroom; that after Mrs. Thorne's death, he was in the

apartment once or twice a week, and that up until October 1st, 1930,

Pinch Home had a room on the second floor, and that Elizabeth Thorne

was there nearly all summer, mostly nights; that the last named

person was working for Gordon D. Thorne; that the dining room furniture

was one of the last things to be moved out; that during the summer

months the furniture and fixtures had been taken away from the living

room; that there was one room called "Gordon Thorne room", which

contained nearly all the furniture, the last of which was moved out

about October 4th. On cross-examination, he stated that he found in

date when the last furniture was moved out, from being told that the

lease expired on October 1st. This witness also testified that the

defendant Schmidt came up after Mrs. Thorne's death with a letter from

Mr. Lindahl, the agent of the building, with a request that he, Schmidt,

be allowed into the apartment; that this was the latter part of the

summer.

Edward J. Lindahl, a real estate agent and owner of

the leasing of the premises in question to Mrs. Thorne, on the part

of his employer, testified that the apartment occupied by Mrs. Thorne

consisted of fifteen rooms and five baths; that in addition to the

apartment, there were three rooms on second floor, which were rented

at \$40.00 per month to Mr. Thorne, as servants quarters; that he was

familiar with the rent is usually and customarily paid in a building

of the character of the one in question in the city of Chicago during

the months of May, June, July and August, 1930, and that a fair rental

for the premises at that time was \$200.00 per month for the apartment

and an additional rental of \$15.00 per month per room for the servants quarters; that he did not know the defendant Thorne; that after May, 1930, he talked with the defendant Schmidt on different occasions, the first conversation being on May 1st, 1930; that he then asked Schmidt about the rental for the apartment, and what he, the witness, should do about the bill, and that Mr. Schmidt told the witness he should send the bill to the office of the attorney for the estate; that he did so, but that the rental has never been paid, and that the bills were made out to the estate of Katherine C. Thorne. He further stated that when he was communicating with Mr. Schmidt, the witness was talking about the liability of the estate of Katherine C. Thorne, and that he never told Schmidt that he, the witness, considered Schmidt responsible for the rent.

The defendant Schmidt testified that he was at the apartment the day of Mrs. Thorne's death, and was appointed executor of the estate on April 18th, 1930, and that he was never in the apartment after that date; that he went to visit the premises in August, 1930, and was told that the rooms were locked, and that he would have to see Mr. Borlum, the janitor; that his purpose in going there was to see the condition of Mrs. Thorne's apartment; that he telephoned Mr. Lindahl, the agent, and told him that he wished to go to the apartment and asked to be permitted to do so, and that Lindahl replied that he would give the witness a letter so that he might do as he desired. This witness also testified that on August 11th, 1930, he received a letter from Lindahl in which he, the witness, was notified that there was due from the estate of Katherine C. Thorne for rental of the apartment the sum of \$3,360.00, being rent for the months of May, June, July and August, 1930, at a monthly rental of \$840.00, and in which Lindahl asked that a check be sent to Lindahl's employer, Paul Steinbrecher & Company. Schmidt further testified that his purpose in visiting the apartment was because he desired to see whether the

and an additional rental of \$15.00 per month per room for the
 servants quarters; that he did not know the defendant Thorne; that
 after May, 1930, he talked with the defendant Schmidt on different
 occasions, the first conversation being on May 1st, 1930; that he
 then asked Schmidt about the rental for the apartment, and what he,
 the witness, should do about the bill, and that Mr. Schmidt told
 the witness he should send the bill to the office of the attorney
 for the estate; that he did so, but that the rental has never been
 paid, and that the bills were made out in the name of Katherine G.
 Thorne. He further stated that when he was communicating with Mr.
 Schmidt, the witness was talking about the liability of the estate
 of Katherine G. Thorne, and that he never told Schmidt that he, the
 witness, considered Schmidt responsible for the rent.

The defendant Schmidt testified that on April 21st, 1930, he
 sent the bill of Mrs. Thorne's death, and was appointed executor of
 the estate on April 12th, 1930, and that he has never in the apartment
 after that date; that he went to visit the premises in August, 1930,
 and was told that the rooms were locked, and that he would have to
 see Mr. Borland, the janitor; that his purpose in going there was to
 see the condition of Mrs. Thorne's apartment; that he telephoned Mr.
 Lindahl, the agent, and told him that he wished to go to the apartment
 and asked to be permitted to do so, and that Lindahl replied that he
 would give the witness a letter so that he could go as he desired.

This witness also testified that on August 11th, 1930, he received a
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 June, July and August, 1930, at a monthly rental of \$840.00, and in
 which Lindahl asked that a check be sent to Lindahl's employer, Paul
 Steinbrocker & Company. Schmidt further testified that his purpose
 in visiting the apartment was because he desired to see whether the

furniture had been removed, and that he suggested to Lindahl that the carpets, pictures and things remain there through the summer months, and that at this time, he had no particular month in mind.

Thorne was not produced as a witness.

Defendants' position is that while the law is that the personal representative of a deceased person who takes possession under a lease to decedant is personally liable for rent accruing after the death of such person, that the record does not show any such situation, but on the contrary, they insist that the record clearly indicates that neither of the defendants was in possession of the property after the death of Mrs. Thorne; also that insofar as Schmidt is concerned, there was no agreement on his part to pay the rent.

In defining the word "possession", Words & Phrases Judicially Defined, Volume 6, page 5465, states the following:

"Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others. Rice v. Frayser, (U.S. 24 Fed. 460, 463.)"

In Baragiano v. Villani, 117 Ill. App. 372, we find the following, quoting:

"Bouvier's Law Dictionary. 'Possession means simply the owning or having a thing in one's power. It may be actual, or it may be constructive.' Brown v. Volkenberg, 64 N. Y. 80. 'It implies a present right to deal with the property at pleasure and to exclude the other persons from meddling with it.' Sullivan v. Sullivan, 66 N. Y. 37, 41."

In the former hearing of this case in Smith v. Thorne, et al. 275 Ill. App. 627, (abstract opinion) No. 36604, we said:

"The defendant, Gordon C. Thorne, testified in substance that he is one of the executors of the estate of Katherine C. Thorne, and that he went to this apartment shortly after his mother's death, and told the janitor, Borlum, that he, Thorne, desired that all the furniture in the apartment should be moved immediately, and that when he, Thorne, visited the place a few weeks later, it had all been moved, except a few old things, which he told the janitor he could have. Thorne further stated that he did not visit the servants quarters, and knew nothing as to their occupancy or content at that time. He denied that he had seen or talked to Deena Lau, the witness who testified that Thorne told her she might remain in the room until October 1st. Thorne also testified that this witness, Deena, Lau, came

furniture had been removed, and that he suggested to Landahl that the carpets, pictures and things remain there through the summer months, and that at this time, he had no particular month in mind.

Thorne was not produced as a witness.

Defendants' position is that while the law is that the personal representative of a deceased person who takes possession under a lease to decedent is personally liable for rent accruing after the death of such person, that the record does not show any such situation, but on the contrary, they insist that the record clearly indicates that neither of the defendants was in possession of the property after the death of Mrs. Thorne; also that insofar as Schmidt is concerned, there was no agreement on his part to pay the rent. In defining the word "possession", Lord & Phipps judicially defined, Vol. 6, page 3463, states the following:

"Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others. 1902 v. Grayson, (U.S. 24 Feb. 483.)"

In Barstow v. Willard, 117 Ill. App. 372, we find the following, quoting:

"Donner's Law Dictionary, 'Possession means simply the owning or having a thing in one's power. It may be actual, or it may be constructive.' Thorne v. Volkman, 84 N. Y. 20. 'It implies a present right to deal with the property at pleasure and to exclude the other persons from meddling with it.' Holliver v. Holliver, 82 N. Y. 37, 41."

In the former hearing of this case in Thorne, et al.

375 Ill. App. 637, (abstract opinion) No. 28004, we said:

"The defendant, Gordon O. Thorne, testified in substance that he is one of the executors of the estate of Katherine O. Thorne, and that he went to this apartment shortly after his mother's death, and told the janitor, William J. Thorne, deceased, that all the furniture in the apartment should be moved immediately, and that when he, Thorne, visited the place a few weeks later, it had all been moved, except a few old things, which he told the janitor he could have. Thorne further stated that he did not visit the servants quarters, and knew nothing as to their occupancy or content at that time. He denied that he had seen or talked to John J. Thorne, the witness who testified that Thorne told her she might remain in the room until October 1st. Thorne also testified that this witness, Dana, Jan, came

to Thorne and that he gave her some money. He stated he did nothing about getting the furniture out, but left that to his wife, and that it was all out by May 1, 1930. * * *

"In the case entitled In re Estate of Thurber, 311 Ill. 211, an appeal was taken from a judgment of the Appellate Court of this district, affirming a judgment of the Circuit Court of Cook County, dismissing a petition filed against the estate of Winfield Scott Thurber. At the time of Thurber's death on September 24, 1913, he was the lessee of premises in Chicago for a term ending April 30, 1919. After his death, his widow was appointed executrix of his estate and continued the business for a considerable period. The petition prayed that the rental for the period occupied by the widow be allowed as an expense against the estate. The petition was denied by both the Probate and the Circuit Court from which an appeal was taken to the Supreme Court, which said:

"An executor has no power, in such capacity, to create a debt against the estate of the deceased, and debts created after the death of the testator cannot be filed as claims against the estate. (3 Schouler on Executors, 6th ed., sec. 2457; Dinsmoor v. Bressler, 164 Ill. 211.) ' * * '

"In 24 Corpus Juris, 147, under the title of 'Landlord and Tenant,' is the following:

'It has been laid down as the rule that the representative who takes possession under a lease to his decedent is personally liable for rent accruing.' Citing Howard v. Heinnerschit, 16 Hun. (N.Y.) 177. In the case 16 Hun. here cited, suit was brought against defendant, who was executrix of her deceased husband's estate. At the time of decedent's death, he occupied certain premises under a lease, the terms of which extended beyond the time of his death. The widow continued to occupy the premises after her husband's death, and the court said:

'I am of opinion that the defendant is liable * * *. The facts found by the court below show that she entered not as executrix, but as legatee. The term was given to her, and she occupied a portion of the demised premises as a place of business until the tenancy ceased. * * *'

In 24 Corpus Juris, page 147, in stating the relationship of an administrator or executor towards a lease held by a decedent as lessee, it is said:

"Since a lease of lands is a chattel interest going to the representative as assets, it devolves upon the representative to perform the contract and he is liable for breach of it. * * *"

On page 148 of the same volume, we find the following:

"Where the term of a lease was unexpired when the lessee died, and his widow as administratrix made all reasonable and proper efforts to sublet the premises, occupying them in the meantime, she was not chargeable in her account with rent during the time of her occupancy."

In support of the last proposition, a footnote to the statement is as follows:

"In re Schroeder, 113 App. Div. 204, 207, 99 NYS 176 [aff 186 N. Y. 537 mem, 78 NE 1112 mem] ('The appellant should not be charged with rent for the premises for the time she remained in them after her husband's death. The estate being chargeable with the unexpired lease, she was justified in remaining in the house to be on hand to show it to prospective tenants and try to rent it if possible. The evidence shows that she used reasonable efforts to rent the house, and there is no evidence to the contrary. * * * By remaining in the house she was not subjecting the estate to any additional burden. The rent would have had to be paid just the same if she had moved out. It cannot be said that, had she moved out, the house could have been rented to some one else, for the evidence is all to the effect that it could not have been so rented')."

In view of the authorities cited, and of the testimony adduced at the trial, we can arrive at no other conclusion than that there was no such occupancy or possession here by either of the defendants as would make them personally liable for the amount of rent as found by the jury. The testimony of plaintiff's agent Lindahl, as to his conversations with the defendant Smith and as to the conditions there, indicates clearly not only that Smith had no physical possession of the premises, but that he had no means of entering the same without Lindahl's permission, and that he never was on the premises but once after Mrs. Thorne's death. Smith also testified to this fact, and his testimony is not contradicted. As to Thorne's personal liability, plaintiff insists that such liability is based largely on Thorne's promise to pay. It is not shown that Thorne was ever in possession of the property, and the testimony of the witness, Arthur D. Welton, on the subject matter of Thorne's individual promise to pay, indicates that there was no such promise made. The only occupancy of any portion of the demised premises after Mrs. Thorne's death, was by servants of Mrs. Thorne who occupied one or two rooms in the servant's quarters, which was not connected in any way with the apartment occupied by Mrs. Thorne. This occupancy appears to have been with Thorne's consent. In view of the fact that the finding and judgment here is predicated upon the

"In the morning, 118 W. 11th St., Div. 10, New York City, [last 186 N. Y. 527] was [the witness] should not be charged with the crime for the time she remained in the latter apartment house. The fact being charged with the apartment house, she was charged in remaining in the house to be on hand to give it in protective tenants and to rent it if possible. The evidence shows that the last apartment house to rent the house, and there is no evidence to the contrary. By remaining in the house she was not neglecting the state to any attention. The rent could have had to be paid just the same if she had moved out. If cannot be said that she moved out, the house could not be rented to her, and she, for the evidence is all to the effect that it could not have been so charged. (.)"

In view of the authorities cited, and of the testimony adduced at the trial, we are of opinion that there was no such conspiracy or collusion here by which the defendants would make themselves personally liable for the amount of rent as found by the jury. The testimony of plaintiff's agent Lindahl, as to his conversations with the defendant with and as to the conditions there, indicates clearly not only that Lindahl had no physical possession of the premises, but that he had no means of entering the same without Lindahl's permission, and that he never was on the premises but once after Mrs. Thorne's death. Smith also testified to this fact, and his testimony is not contradicted. As to Thorne's personal liability, plaintiff insists that even liability is based largely on Thorne's promise to pay. It is not shown that Thorne was ever in possession of the property, and the testimony of the witness, Edward D. Carter, on the subject matter of Thorne's individual promise to pay, indicates that there was no such promise made. The only occurrence of any action of the admitted premises after Mrs. Thorne's death, was by servants of Mrs. Thorne who occupied one or two rooms in the servant's quarters, which was not connected in any way with the apartment occupied by Mrs. Thorne. This conspiracy appears to have been with Thorne's consent. In view of the fact that the finding and judgment here is predicated upon the

theory that these defendants occupied the entire leased premises, it will be necessary that the judgment be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

theory that these defendants accounted the entire leased premises,
it will be necessary that the judgment be reversed and the cause
remanded for a new trial.

REVEREND AND HONORABLE JUDGE

DENIS J. SUMMERS, J. J. AND JAMES J. HONORABLE

38985

RUDOLPH WITZANI,

Appellant,

v.

RALPH L. SHANNON,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

2911.A. 611¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Circuit Court of Cook County against plaintiff for costs of suit.

The action arose out of a collision between automobiles driven by plaintiff and defendant. The trial was by a jury, which rendered a verdict in favor of defendant, and judgment was entered on the verdict. While the record is extremely confusing in most particulars, one thing seems to be admitted by both parties and that is, that the accident out of which the action arises, occurred at or near the intersection of Diversey Avenue and the north end of the inner drive through Lincoln Park, in Chicago. Also, it seems to be admitted that plaintiff was driving a Willys-Knight coupe, and defendant a Plymouth sedan. Plaintiff claims that he was driving north, and that defendant was driving south at the time of the accident. Defendant claims that he was driving north and that plaintiff came from the north and was driving toward the south. After the verdict, the plaintiff filed a written motion for a new trial upon the charge that a material witness for defendant had admitted that he had committed perjury on a material issue. It is also urged that the verdict of the jury was against the manifest weight of the evidence.

Catherine Pealus, a witness for plaintiff, testified to the effect that on October 6th, 1934, the date of the accident, she was employed as a pastry cook in the Harding Restaurant, located at 21 South Wabash Ave., in Chicago; that she had known the plaintiff for a considerable period of time prior thereto; that at the time of the

RUDOLPH LITVIN,
 Plaintiff,
 v.
 RALPH L. SHARON,
 Defendant.

Circuit Court of Cook County, Illinois
 Case No. 111 A. 511

MR. JUSTICE DELIVERED THE VERDICT OF THE COURT.

This is an appeal by Plaintiff from a judgment of the Circuit Court of Cook County, Illinois, rendered in an action brought by Plaintiff against Defendant for costs of suit. The action arose out of a collision between an automobile driven by Plaintiff and Defendant. The trial was by a jury, which rendered a verdict in favor of Defendant, and judgment was entered on the verdict. While the record is extremely confusing in most particulars, one thing seems to be admitted by both parties and that is, that the accident out of which the action arises, occurred at or near the intersection of Divisadero Avenue and the north end of the inner drive through Lincoln Park, in Chicago. Also, it seems to be admitted that Plaintiff was driving a Willys-Knight coupe, and Defendant a Plymouth sedan. Plaintiff claims that he was driving north, and that Defendant was driving south at the time of the accident. Defendant claims that he was driving north and that Plaintiff came from the north and was driving toward the south. After the verdict, the Plaintiff filed a written motion for a new trial upon the charge that a material witness for Defendant had admitted that he had committed perjury on a material issue. It is also urged that the verdict of the jury was against the manifest weight of the evidence.

Catherine Jones, a witness for Plaintiff, testified to the effect that on October 8th, 1934, the date of the accident, she was employed as a pastry cook in the Harding Restaurant, located at 21 South Dearborn Ave., in Chicago; that she had known the Plaintiff for a considerable period of time prior thereto; that at the time of the

accident, she was riding with plaintiff to the home of his sister in Evanston to do some baking; that her hours for working at the restaurant were from 8 o'clock in the evening until 4:30 in the morning; that at the time of the accident, she was occupying the seat of the automobile at the right side of plaintiff, and that they proceeded north on Wabash Avenue and turned into Lincoln Park going north; that immediately prior to the accident, she saw a flash of light, and that then she was knocked unconscious, and that the flash of light she saw was on her left hand side, and that at that time, plaintiff was driving on the right hand side of the roadway. On cross-examination, she testified that she had known plaintiff for a considerable period; that at the time of the accident, dawn was just breaking, that the street lights were still lit, that it was clear, and that the head lights on their car were lighted up to the time of the accident; that she had ridden in the car before and that at the time of the accident, they were going very slow, - she would judge at a speed of about 15 to 20 miles an hour.

Plaintiff testified, in substance, that on the morning of the day in question, he left his place of employment at about 4:30 o'clock, and after procuring his automobile, he took the last named witness into his car; that for three and a half years he had frequently driven on the driveway through Lincoln Park; that the accident happened on the driveway near Diversey Boulevard; that at that time, he was driving at a speed of from 25 to 30 miles an hour, and that he saw no other car, until a moment before the accident happened; that he attempted to pull further over to the right, and that the next thing he remembered he was in the hospital. He stated that just prior to the accident, and while he was driving on the right side of the driveway, that he then first saw plaintiff's car, and that it was about 75 feet from him and coming south in the middle of the driveway.

accident, and was riding with plaintiff to the home of his sister in
 Evanston to do some work; that her house for working at the
 restaurant were from 8 o'clock in the evening until 4:30 in the
 morning; that at the time of the accident, she was occupying the
 seat of the automobile at the right side of plaintiff, and that they
 proceeded north on Ash Avenue and turned into Lincoln Park going
 north; that immediately prior to the accident, she saw a flash of
 light, and that then she was knocked unconscious, and that the flash
 of light she saw was on her left hand side, and that at that time,
 plaintiff was driving on the right hand side of the roadway. On
 cross-examination, she testified that she had known plaintiff for a
 considerable period; that at the time of the accident, there was just
 breaking, that the street lights were still lit, that it was clear,
 and that the head lights on their car were lighted up to the time of
 the accident; that she had ridden in the car before and that at the
 time of the accident, they were going very slow, - she would judge
 at a speed of about 15 to 20 miles an hour.

Plaintiff testified, in substance, that on the morning of
 the day in question, he left his place of employment at about 4:30
 o'clock, and after putting in his automobile, he took the last named
 witness into his car; that for three and a half years he had frequently
 driven on the driveway through Lincoln Park; that the accident
 happened on the driveway near driveway alleyway; that at that time,
 he was driving at a speed of from 15 to 20 miles an hour, and that
 he saw no other car, until a moment before the accident happened;
 that he attempted to pull further over to the right, and that the next
 thing he remembered he was in the hospital. He stated that just prior
 to the accident, and while he was driving on the right side of the
 driveway, that he then first saw plaintiff's car, and that it was
 about 75 feet from him and coming south in the middle of the driveway.

A police officer named William Little testified that he received a telephone call to go to the scene of the accident, which occurred at about Diversey Avenue and that when he arrived, all of the persons involved in the accident had departed; that at that time, both cars were off the drive to the east about 30 feet, a Plymouth, (defendant's car) was facing south, and that the other car faced in a southeasterly direction, and that both cars were about 15 or 20 feet from the point of the collision; that the right rear wheel of the Willys-Knight (plaintiff's car) was on the pavement; that he observed skid marks on the surface of the highway, and that one skid mark led right up to the wheel of the Willys-Knight car which was on the pavement; that, together with another police officer, he measured the various marks and positions; that at that time, the street lights were lighted, and that when he arrived at the scene, it was about 6:30 or a quarter to seven in the morning, and that it was then daylight; that the car over in the parkway was a coach, and that the other car was a coupe, and that they were both black and pretty well smashed up; that the coupe which was headed southeast, was on the east side of the pavement, and that the sedan which was headed north, was off the pavement about 30 feet.

Adolph J. Sinkula, an auditor for the Harding Restaurant, testified that on the morning of October 6th, 1934, the day of the accident, his record showed that plaintiff quit work at 4:30 in the morning, and did not report back until later. As to plaintiff's employment, whereabouts and working hours on the day of the accident, this witness was corroborated by other witnesses.

Claude M. Towne, the witness, who is now charged with having committed perjury on the trial of the cause, was produced by defendant, and testified to the effect that on the evening in question he had been at a hotel with some friends, and that he was driving south in Lincoln Park near the vicinity of the accident about 5 o'clock in

A police officer named Willie Little testified that he received a telephone call to go to the scene of the accident, which occurred at about Divisadero Avenue and that when he arrived, all of the persons involved in the accident had departed; that at that time, both cars went off the drive to the east about 70 feet, a Plymouth (defendant's car) was facing south, and that the other car faced in a southeasterly direction, and that both cars were about 15 or 20 feet from the point of the collision; that the right rear wheel of the Willys-Knight (plaintiff's car) was on the pavement; that he observed skid marks on the surface of the highway, and that one skid mark led right up to the wheel of the Willys-Knight car which was on the pavement; that, together with another police officer, he measured the various marks and positions; that at that time, the street lights were lighted, and that when he arrived at the scene, it was about 8:30 or a quarter to seven in the morning, and that it was then daylight; that the car over in the driveway was a coupe, and that the other car was a coupe, and that they were both black and pretty well smashed up; that the coupe which was headed southeast, was on the east side of the pavement, and that the sedan which was headed north, was off the pavement about 30 feet.

William J. Stankus, an auditor for the Harding Testament, testified that on the morning of October 2nd, 1935, the day of the accident, his record showed that plaintiff quit work at 4:30 in the morning, and did not report back until later. As to plaintiff's employment, thereabouts and working hours on the day of the accident, this witness was corroborated by other witnesses.

Clara E. Lowe, the witness, who is now connected with having committed perjury on the trial of the cause, was ordered by defendant and testified to the effect that on the evening in question he had been at a hotel with some friends, and that he was driving south in Lincoln Park near the vicinity of the accident about 2 o'clock in

the morning of October 6th, 1934; that just before the accident happened, and in the immediate vicinity of the place where it did happen, an automobile passed him going south, and that at the time it passed, the witness' car was standing still waiting for a traffic light, and that he was just starting his car at this time; that he was then four or five blocks from where the accident happened; that the car which passed him had two people in it, a man and a woman; that this car was a dark colored coupe, and that at this time it was going about 50 miles an hour; that he picked up speed and started after it, and that he saw the collision when he was about two blocks from the place where it happened; that when he got up to the point of the accident, he saw the coupe which had just passed him, and that the coupe was then standing on the left side of the road, which would be the east side, and on the extreme edge of the pavement facing south; that just before the accident, he saw this coupe suddenly veer over to the left, which would be to the east of the point where the collision occurred, and that at that time, he could not see the northbound car, and that at this time, the sedan which he had previously seen was over to the left of the Willys-Knight car, and off the pavement; that he had never before seen, and did not know any of the people involved in the accident; that he assisted the people and saw that they were all unconscious; that he put the two injured women in his car and took them to the Columbus Memorial Hospital.

Another police officer named James Lefevour testified to the effect that on the morning in question he was called to the scene of the accident, and that he arrived there at about 5:20 A.M.; that on the inner drive just north of Diversey Avenue, he found a Willys-Knight coupe facing south on the east side of the drive, three wheels off the road, and one wheel on the road, and that he found a Plymouth sedan about 15 or 20 feet north of the Willys-Knight,

the morning of October 6th, 1934; that just before the accident happened, and in the immediate vicinity of the place where it did happen, an automobile passed him going south, and that at the time it passed, the witness' car was standing still waiting for a traffic light, and that he was just starting his car at this time; that he was then four or five blocks from where the accident happened; that the car which passed him had two people in it, a man and a woman; that this car was a dark colored coupe, and that at this time it was going about 20 miles an hour; that he picked up speed and started after it, and that he saw the collision when he was about two blocks from the place where it happened; that when he got up to the point of the accident, he saw the coupe which had just passed him, and that the coupe was then standing on the left side of the road, which would be the east side, and on the extreme side of the pavement facing south; that just before the accident, he saw this coupe suddenly veer over to the left, which would be to the east of the point where the collision occurred, and that at that time, he could not see the northbound car, and that at this time, the sedan which he had previously seen was over to the left of the Willys-Knight car, and off the pavement; that he had never before seen, and did not know any of the people involved in the accident; that he assisted the people and saw that they were all unconscious; that he and the two injured women in his car took them to the Columbus Memorial Hospital.

Another police officer named James Lefavour testified to the effect that on the morning in question he was called to the scene of the accident, and that he arrived there at about 8:30 A.M.; that on the inner drive just north of Giverty avenue, he found a Willys-Knight coupe facing south on the west side of the drive, three wheels off the road, and one wheel on the road, and that he found a Plymouth sedan about 12 or 15 feet north of the Willys-Knight.

about 30 feet in the park, and that the wheels of the latter car were off the road and on the park east of the driveway; that he observed some skid marks in the drive for about 8 or 10 feet, which led up to the left rear wheel of the Willys-Knight coupe, and that these wheel marks ended at the park; that he made an examination of the west side of the roadway and found wheel marks coming from the west into the northbound lane of traffic; that a concrete lamp post standing in the middle of the road had been struck, and a piece taken out of it; that the left front wheel of the Willys-Knight car had been damaged and the right front door and fender of the Plymouth was damaged and that he found marks and scratches on the right rear fender, rear hub cap and bumper of the Plymouth.

Defendant testified that he resided in the city of Chicago, that he was a married man, and had experience in the operation of motors, having flown an aeroplane during the war; that at the time of the accident, October 6th, 1934, he was employed by the Brunswick-Balke-Collender Company as a salesman, and had been in their employ for 13 or 14 months; that on that evening, he borrowed the car in question from a friend, and had dinner with him on the north side; that he left the north side at about 8:15 or 8:30 P.M. and drove south to 6318 Cottage Grove Avenue, arriving there between 9 and 9:30 o'clock; that the place he visited was a cafe operated by a man named Walsh, and that the business in which defendant was engaged, made it necessary for him to see his customers in the evening; that the car which he drove was a Plymouth sedan, which he had driven before on a number of occasions, and that the car was in good mechanical condition; that he left Walsh's cafe on Cottage Grove Avenue after 4 o'clock in the morning; that at the time, he resided at 6423 North Washtenaw Avenue in Rogers Park, and that after leaving 6318 Cottage Grove Avenue, he drove north on Cottage Grove avenue to the outer bridge at 22nd Street, and took the outer drive to Monroe Street,

about 30 feet in the park, and that the wheels of the latter car were off the road and on the park east of the driveway; that he observed some skid marks in the drive for about 2 or 10 feet, which led up to the left rear wheel of the Allyn-Knight coupe, and that these wheel marks ended at the park; that he made an examination of the west side of the roadway and found wheel marks coming from the west into the northbound lane of traffic; that a concrete lamp post standing in the middle of the road had been struck, and a piece taken out of it; that the left front wheel of the Allyn-Knight car had been damaged and the right front door and fender of the Plymouth was damaged and that he found marks and scuffs on the right rear fender, rear hub cap and bumper of the Plymouth.

Defendant testified that he resided in the city of Chicago, that he was a married man, and had experience in the operation of motors, having flown an airplane during the war; that at the time of the accident, October 27, 1934, he was employed by the Brunswick-Balke-Goller Company as a salesman, and had been in their employ for 13 or 14 months; that on that evening, he borrowed the car in question from a friend, and had dinner with him on the north side; that he left the north side at about 8:15 or 8:30 P.M., and drove south to 6315 Cottage Grove Avenue, arriving there between 9 and 9:30 o'clock; that the place he visited was a cafe operated by a man named Walsh, and that the business in which defendant was engaged, he made it necessary for him to see his creditors in the evening; that the car which he drove was a Plymouth sedan, which he had driven before on a number of occasions, and that the car was in good mechanical condition; that he left Walsh's cafe on Cottage Grove Avenue after 9 o'clock in the evening; that at the time, he resided at 6225 North Western Avenue in Chicago, and that after leaving 6315 Cottage Grove Avenue, he drove north on Cottage Grove Avenue to the outer bridge at 72nd Street, and took the outer drive to Monroe Street,

and then drove to Michigan Avenue and then north on Michigan Avenue; that he remained on Michigan Avenue going north through Lake Shore Drive, then through Lincoln Park on the inner drive and up past Diversey Beach to the place where the accident occurred; that the accident happened shortly after he passed a car going in the same direction, and that he was about 150 feet north of the car which he had just passed; that after he had passed this car, he turned towards the east and was going about 30 to 35 miles an hour; that he then saw a pair of headlights, and that "they seemed to be right on the automobile", and that "they were to my left coming across the road. I jammed my brakes, swung my wheel hard left", and that he afterwards learned that his car was struck on the right hand side. On cross-examination, this witness testified that "I took the outer drive at Belmont Avenue going south. Just before the accident happened, I swung hard left and I was traveling about 30 miles an hour; left is west." A woman who was riding with defendant in his car, was killed.

A witness named Weber Jensen testified for defendant in a deposition taken at Los Angeles, California. His testimony was to the effect that on the morning of the accident, at about 5 o'clock, he was going down Lake Shore Drive in Lincoln Park where the accident happened; that he was about 75 to 100 feet from the scene of the accident when it occurred, and that it occurred on the right side of the road going north at the easterly edge of the paved portion of the roadway; that he had fixed a flat tire approximately 200 yards from the point of the accident, and that he was just starting up when a car went by at a pretty good rate of speed, and that he could not tell whether it was the car that was involved in the accident, or not; that he saw a southbound car meet with a northbound car, and that the southbound car swerved from the west to the east; that he found out that one car in the accident was a Willys-Knight and one a Plymouth, and that he observed their positions after the accident, that the

and then drove to Michigan Avenue and then north on Michigan Avenue; that he remained on Michigan Avenue going north through Lake Shore Drive, then through Lincoln Park on the inner drive and up past Diversey Beach to the place where the accident occurred; that the accident happened shortly after he passed a car going in the same direction, and that he was about 150 feet north of the car which he had just passed; that after he had passed this car, he turned towards the east and was going about 30 to 35 miles an hour; that he then saw a pair of headlights, and that "they seemed to be right on the automobile", and that "they were to my left coming across the road. I jammed my brakes, swung my wheel hard left", and that he afterwards learned that his car was struck on the right hand side. On cross-examination, this witness testified that "I took the outer drive at Belmont Avenue going south. Just before the accident happened, I swung hard left and I was traveling about 35 miles an hour; left is west." A woman who was riding with defendant in his car, was killed. A witness named Robert Jensen testified that defendant in a deposition taken at Los Angeles, California. His testimony was to the effect that on the morning of the accident, at about 3 o'clock, he was going down Lake Shore Drive in Lincoln Park where the accident happened; that he was about 75 to 100 feet from the scene of the accident when it occurred, and that it occurred on the right side of the road going north at the westerly side of the outer portion of the roadway; that he had fixed a first time approximately 300 yards from the point of the accident, and that he was just standing up when our witness at a fairly good rate of speed, and that he could not tell whether it was the car that was involved in the accident, or not; that he saw a southbound car meet with a northbound car, and that the southbound car swerved from the west to the east; that he turned out that one car in the accident was a Buick-Knight and one a Plymouth, and that he observed their positions after the accident, that the

Plymouth was headed north and was about 15 feet off the east side of the road, and the Willys-Knight was facing south on the east lane, and that this was the wrong side of the road if the car was traveling south; that the Willys-Knight was on an angle when it came to a stop, that the front wheels were further west than the rear wheels, and that the Willys-Knight was sitting north of the Plymouth.

A witness named Marvin Elon Jensen testified that he witnessed the accident, but that he could not see which direction either of the cars were going.

John J. Walsh, who was the owner of the cafe and restaurant where defendant testified that he spent the evening prior to the accident, testified to the effect that he visited with the defendant until about 4 o'clock in the morning, witnessing a floor show, and that he could not say just exactly what time defendant left, but that the witness left defendant a few minutes after 4 o'clock, and that when he returned to the place where they had been visiting about 30 minutes later, defendant had gone.

The motion for a new trial was principally based upon the ground that Towne, one of the witnesses for defendant, had, by affidavit, admitted that he committed perjury in his testimony on the trial. In this affidavit Towne states in effect that on the trial he testified that the car which passed him was a dark colored coupe; that he actually saw and heard the collision of the cars, that he saw this coupe going south and come to a sudden stop, and that this was the coupe which had passed him; that he saw this car ahead of him after it had passed, and that it was on the right side of the road, and that he suddenly saw it veer over to the left, and that this was the Willys-Knight coupe which was involved in the accident. He further stated in this affidavit that all of the above statements were untrue, that he did not know whether the car that passed him, as he was waiting for the change of lights at the north end of

Plymouth was headed north and was about 15 feet off the east side of the road, and the Willys-Knight was facing south on the east lane, and that this was the wrong side of the road if the car was traveling south; that the Willys-Knight was on an angle when it came to a stop, that the front wheels were further west than the rear wheels, and that the Willys-Knight was sitting north of the Plymouth.

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The action for a new trial was originally heard upon the ground that Tonne, one of the witnesses for defendant, had, by affidavit, admitted that he committed perjury in his testimony on the trial. In this affidavit Tonne stated to effect that on the trial he testified that the car which passed him was a dark colored coupe; that he actually saw and heard the collision of the cars, that he saw this coupe going south and come to a sudden stop, and that this was the coupe which had passed him; that he saw this car ahead of him after it had passed, and that it was on the right side of the road, and that he suddenly saw it veer over to the left, and that this was the Willys-Knight coupe which was involved in the accident. He further stated in this affidavit that all of the above statements were untrue, that he did not know whether the car that passed him as he was sitting for the change of lights at the north end of

Lincoln Park, was a coupe or sedan; that he did not see the coupe suddenly veer over to the left, nor did he see it come to a sudden stop; that he had attended a party at the Donmoor Hotel, where he had drunk some liquor, and that at the time he stopped for the change of lights, his mind was befuddled; that subsequent to the accident, he appeared as a witness at the coroner's inquest, and testified that he did not actually see the collision; that just prior to the trial, he was called to the office of Burt Crowe, the attorney representing the defendant, and that Mr. Crowe told him that he had testified at the coroner's inquest that the car that passed him while he was standing, was a coupe; that relying upon Mr. Crowe's assertion that he had so testified that the car that had passed him was a coupe, he so testified at the trial; that at the time of his conference with Mr. Crowe, the witness told Mr. Crowe that he had been put to considerable expense, that his automobile was damaged from the blood of the injured people he took to the hospital, and that he asked Mr. Crowe whether he would defray the expenses, and that Mr. Crowe told him he would be taken care of; that on the evening prior to the trial of the case, he told a member of the firm of Heth & Lister, attorneys for the plaintiff, that he would be in their office on the following morning and go with them to testify on behalf of plaintiff in the same manner as he had testified at the coroner's inquest. Upon examination of this witness by the court at the time of the presentation of this affidavit, it developed that the witness had, shortly after the trial of the cause, been taken to the office of the State's Attorney of Cook County, where he remained for some considerable time, and was cross-examined by an assistant state's attorney in the presence of one of the attorneys for the plaintiff, and that after such cross-examination, he went to the office of the attorney for the plaintiff and made the affidavit referred to. On the hearing before the court on the motion

Lincoln Park, was a coupe or sedan; that he did not see the coupe suddenly veer over to the left, nor did he see it come to a sudden stop; that he had attended a party at the Danmore Hotel, where he had drunk some liquor, and that at the time he stopped for the change of lights, his mind was befuddled; that subsequent to the accident, he appeared as a witness at the coroner's inquest, and testified that he did not actually see the collision; that just prior to the trial, he was called to the office of Mark Grove, the attorney representing the defendant, and that Mr. Grove told him that he had testified at the coroner's inquest that the car that passed him while he was standing, was a coupe; that relying upon Mr. Grove's assertion that he had so testified that the car that had passed him was a coupe, he so testified at the trial; that at the time of his conference with Mr. Grove, the witness told Mr. Grove that he had been put to considerable expense, that his automobile was damaged from the blow of the injured party as he took to the hospital, and that he asked Mr. Grove whether he would delay the expense, and that Mr. Grove told him he would be taken care of; that on the evening prior to the trial of the case, he told a member of the firm of Hatch & Weston, attorneys for the plaintiff, that he would be in their office on the following morning and go with them to testify on behalf of the plaintiff in the same manner as he had testified at the coroner's inquest. Upon examination of this witness by the court at the time of the presentation of this affidavit, it developed that the witness had, shortly after the trial of the case, been taken to the office of the State's Attorney of Cook County, where he remained for some considerable time, and was cross-examined by an assistant state's attorney in the presence of one of the attorneys for the plaintiff, and that after such cross-examination, he went to the office of the attorney for the plaintiff and made the affidavit referred to. On the morning before the court on the motion

for a new trial, supported by this affidavit, it was stated by the attorney for the defendant in this case that when Towne was taken to the State's Attorney's office, ~~that~~ he was coerced, and was told that unless he made an affidavit of the character presented to the court he would be sent to the penitentiary.

In view of the fact that on the presentation of the motion for a new trial the court had all the parties before him, heard them in great detail, and after such hearing denied the motion, we are of the opinion that the trial court's judgment should not be interfered with. As the case was presented to the jury, nothing was involved but questions of fact. The jury saw and heard all the witnesses, and we are of the opinion that the verdict and judgment should not be disturbed. The judgment is, therefore, affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

for a new trial, supported by this affidavit, it was stated by the attorney for the defendant in this case that when Towne was taken to the State's Attorney's office, he was coerced, and was told that unless he made an affidavit of the character, presented to the court he would be sent to the penitentiary.

In view of the fact that on the presentation of the motion for a new trial the court had all the parties before him, heard them in great detail, and after such hearing denied the motion, we are of the opinion that the trial court's judgment should not be interfered with. As the case was presented to the jury, nothing was involved but questions of fact. The jury saw and heard all the witnesses, and we are of the opinion that the verdict and judgment should not be disturbed. The judgment is, therefore, affirmed.

ATTEST:

DEWIS E. BULLIVANT, C. J., and HENRY G. SWANSON.

39073

HERMAN N. SCHOOKE,

Appellee,

v.

ALEXANDER GLANZ and LOUIS D. GLANZ,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

291 I.A. 611²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On July 3rd, 1935, plaintiff brought suit in the Municipal Court of Chicago against the defendants upon an alleged contract between the parties, under the terms of which the plaintiff claims that the defendants agreed to pay him certain amounts for making an audit of the unsecured loans of the Home Bank & Trust Company from July 1st, 1929, to January 10th, 1931. The cause was submitted to a jury, which returned a verdict in favor of plaintiff in the sum of \$1,000.00, upon which judgment was entered, and from which judgment this appeal is being prosecuted. There is no appearance here for the plaintiff.

The theory of the contending parties, as stated in defendants' brief, is as follows: "The theory of the plaintiff is that he and his assistant, Mr. Wright, were first employed to render services commencing with the period from July 1, 1929, to January 10, 1931, for the sum of \$500.00, and that they were afterwards employed to render services covering the additional period from January 1, 1928, to July 1, 1929. The theory of the defendants is that only one contract was made, and that the entire services were to be rendered for the sum of \$500.00, and that their services were to cover the period beginning with January 1, 1928, and ending with January 10, 1931."

Plaintiff testified, in substance, that he had been an accountant, but not a certified public accountant, for about 25 years, also as to his experience in this work, and that in September, 1932, he received a call from a lawyer named Levy, who told the plaintiff that he desired to have an audit made of the Home Bank books, and

HENRY M. SCHOCKE,

Appellee,

v.

ALEXANDER GRANE and LOUIS D. GRANE,

Appellants.

OF CHICAGO.

2d Cir. 111

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On July 27d, 1935, Plaintiff brought suit in the Municipal

Court of Chicago against the defendants upon an alleged contract between the parties, under the terms of which the plaintiff claims that the defendants agreed to pay him certain amounts for acting as audit of the unsecured loans of the Home Bank & Trust Company from July 1st, 1932, to January 10th, 1931. The cause was submitted to a jury, which returned a verdict in favor of plaintiff in the sum of \$1,000.00, upon which judgment was entered, and from which judgment this appeal is being prosecuted. There is no appearance here for the plaintiff.

The theory of the contending parties, as stated in defendant's

brief, is as follows: "The theory of the plaintiff is that he and his assistant, Mr. Wright, were first employed to render services commencing with the period from July 1, 1932, to January 10, 1931, for the sum of \$500.00, and that they were afterwards employed to render services covering the additional period from January 1, 1932, to July 1, 1932. The theory of the defendants is that only one contract was made, and that the entire services were to be rendered for the sum of \$500.00, and that their services were to cover the period beginning with January 1, 1932, and ending with January 10, 1931." Plaintiff testified, in substance, that he had been an

accountant, but not a certified public accountant, for about 25 years, also as to his experience in this work, and that in September, 1932, he received a call from a lawyer named Levy, who told the plaintiff that he desired to have an audit made of the Home Bank books, and

asked plaintiff what his charge would be; that this lawyer told the plaintiff that there was pending a suit against the defendants for \$130,000; that Levy told plaintiff that Wright (another accountant) desired that an audit be made of the unsecured loans and discounts of the bank mentioned, from July, 1929, to the end of 1930, and a portion of 1931, and that he, plaintiff, told this lawyer that he would do the work for \$500.00, and that he made the same statement to Louis Glanz. The record indicates that plaintiff proceeded with the work of making the audit of the books of the bank mentioned, and there is some testimony to the effect that after he and his assistant had been working for a considerable period, the plaintiff had a conversation with Levy, who it appears, is the attorney for the defendants here, in which plaintiff made the claim that the work was more extensive than plaintiff had anticipated, and that he should receive further compensation than the \$500.00 originally agreed upon, and that Levy told plaintiff that he should proceed with the work, and that he, plaintiff, need not worry about his further compensation.

We have searched the record to ascertain whether or not the defendants ever ratified this alleged promise, and we find nothing to indicate that they did. Both of the defendants testified that they made no agreement with plaintiff to pay him more than the original contract price. The complaint filed in the case states that plaintiff was paid the sum of \$800.00 for the work done, and we find nothing in the record to indicate that he was entitled to more than that amount.

The judgment is reversed.

JUDGMENT REVERSED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

asked Plaintiff that his only job; that this lawyer told the Plaintiff that there was pending a suit against the defendants for \$130,000; that Levy told Plaintiff that Wright (another accountant) desired that an audit be made of the unrecorded loans and discounts of the bank mentioned, from July, 1932, to the end of 1933, and a portion of 1931, and that he, Plaintiff, told this lawyer that he would do the work for \$500.00, and that he made the same statement to Louis Glanz. The record indicates that Plaintiff received with the work of making the audit of the books of the bank mentioned, and there is some testimony to the effect that after he and his assistant had been working for a considerable period, the Plaintiff had a conversation with Levy, and it appears, in the testimony for the defendants here, in which Plaintiff made the claim that the work was more extensive than Plaintiff had anticipated, and that he should receive further compensation than the \$500.00 originally agreed upon, and that Levy told Plaintiff that he should proceed with the work, and that he, Plaintiff, need not worry about his further compensation.

It was stipulated the record to ascertain whether or not the defendants ever ratified this alleged promise, and we find nothing to indicate that they did. Both of the defendants testified that they made no agreement with Plaintiff to pay him more than the original contract price. The complaint filed in the case states that Plaintiff was paid the sum of \$500.00 for the work done, and we find nothing in the record to indicate that he was entitled to more than that amount.

The judgment is reversed.

JUDGMENT REVERSED.

DENIS F. SWINNEY, J. and WALTER J. GORMAN.

39110

SOPHIE ROTHENBERG,

Plaintiff below,

v.

JAMES STEFFENS, et al.,

Defendants below,

OAK PARK TRUST AND SAVINGS BANK, a
corp., as Trustee, etc., et al.,

Petitioners below - Appellants,

v.

SAMUEL LEFKOVITS,

Respondent below - Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

291 I.A. 611³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County entered on May 21st, 1936. The order is as follows:

"The matter coming on to be heard on petition of Oak Park Trust & Savings Bank, as trustee, Fred W. Georgs, Albert W. Harms, Julius Schornak, and the verified answer of Samuel Lefkovits, and the motion of petitioners to strike the verified answer of Samuel Lefkovits, and for judgment on petitioners' verified petition; and the Court having read the petition and answer and motion to strike, and heard arguments of counsel, orders that the motion to strike the verified answer of respondent be overruled; that petitioners' motion for judgment on their verified petition be denied and that the petition of Oak Park Trust & Savings Bank, trustee under Trust Agreement No. 1191, Fred W. Georgs, Albert W. Harms, and Julius Schornak, be dismissed for want of equity."

On April 17th, 1936, after leave of court had been obtained for that purpose, the Oak Park Trust & Savings Bank, as trustee of Trust No. 1191 hereinafter referred to, together with Fred W. Georgs, Albert W. Harms and Julius Schornak, trust managers of such trust, filed a verified petition in the matter of Sophie Rothenberg v. James Steffens, et al., in which they allege that Sophie Rothenberg, a bondholder, had filed suit on April 15th, 1932, to foreclose a trust deed on premises described in her complaint, and that on April 16th, 1932, the American National Bank & Trust Company was appointed receiver for the premises described; that on the date of the appointment of the

ROMILS KORNHANS,

Plaintiff below,

v.

JAMES STEFENS, et al.,

Defendants below,

OAK PARK TRUST AND SAVINGS BANK,
corp., as Trustee, etc., et al.,

Petitioners below - Appellants,

v.

MANUEL LEBKOVITS,

Respondent below - Appellee.

MR. JUSTICE WILL DELIVER THE DECISION ON THIS CASE.

This is an appeal from an order of the Superior Court of

Cook County entered on May 1st, 1932. The order is as follows:

"The matter coming on to be heard on petition of Oak Park

Trust & Savings Bank, as trustee, Fred W. George, Albert E.

Harms, Julius Kornhans, and the verified answer of Manuel

Lebkovits, and the motion of petitioners to strike the verified

answer of Manuel Lebkovits, and for judgment on petitioners'

verified petition; and the court having read the petition and

answer and motion to strike, and heard arguments of counsel,

orders that the motion to strike the verified answer of respon-

dent be overruled; that petitioners' motion for judgment on their

verified petition be denied and that the petition of Oak Park

Trust & Savings Bank, answered under protest, be dismissed

for want of equity."

On April 17th, 1932, after leave of court had been obtained

for that purpose, the Oak Park Trust & Savings Bank, as trustee of

Trust No. 1711 heretofore referred to, together with Fred W. George,

Albert W. Harms and Julius Kornhans, trust managers of said trust,

filed a verified petition in the matter of Sophie Kornhans v. James

Stefens, et al., in which they allege that Sophie Kornhans, a bond-

holder, had filed suit on April 15th, 1932, to foreclose a trust deed

on premises described in her complaint, and that on April 15th, 1932,

the American National Bank & Trust Company was appointed receiver for

the premises described; that on the date of the appointment of the

receiver, one Samuel Lefkovits, as a bondholder, filed his bill to foreclose a lien of the same trust deed upon the same premises; that in the suit of Sophie Rothenberg, summons was issued, but that no summons was issued in the Lefkovits suit, and that in the foreclosure proceeding instituted by Sophie Rothenberg, Samuel Lefkovits was made a defendant, was duly served with summons, filed no appearance in the cause, and on December 28th, 1932, an order of default was entered in the Superior Court of Cook County against him; that by the same order the cause was referred to a Master in Chancery to take proofs, and that the order has not been modified, set aside nor reversed, but remains in full force and effect; that on February 28th, 1933, a decree of sale was entered in said cause; that thereafter on March 29th, 1933, the Master was ordered to give notice of at least ten days before any sale to all persons holding bonds secured by the trust deed in question of the date of the proposed sale of the property, and that the order of sale entered was a final order; that thereafter, in pursuance of this order, a sale of the property was made by the Master on September 13th, 1934, and the report of such sale and distribution of the proceeds was duly reported to the court; that on November 21st, 1934, an order was entered in the Superior Court of Cook County approving the Master's report of sale and distribution; that by the Master's report it was found that the sale was not made for a sufficient amount to pay the indebtedness which the trust deed was given to secure, and by the decree referred to, it was ordered that the deficiency be assessed against the defendant, James Steffens, who, the court found, was personally liable therefor, and in the same order the court found that the deficiency had been satisfied in open court to the extent of \$44,871.48; that on November 22nd, 1934, the receiver was ordered to surrender possession of the premises to the purchaser, Oak Park Trust & Savings Bank, as trustee, and to file its final report and account, which was done, and that

receiver, one Samuel Lefkowitz, as a defendant, filed his bill to foreclose a lien of the same trust fund upon the same proceeds; that in the suit of Lefkowitz v. Samuel Lefkowitz, Samuel was named, but that no summons was issued in the Lefkowitz suit, and that in the foreclosure proceedings, instituted by Lefkowitz v. Samuel Lefkowitz, was made a defendant, was duly served with summons, filed no answer, in the case, and on December 18th, 1932, an order of default was entered in the Superior Court of Cook County against him; that by the same order the cause was referred to a master in Chancery to take proofs, and that the order has not been modified, and said order reversed, and remains in full force and effect; that on February 18th, 1933, a decree of sale was entered in said court; that thereafter on March 10th, 1933, the master was ordered to give notice of at least ten days before any sale to all persons holding claims secured by the trust deed in question at the date of the proposed sale of the property, and that the order of sale entered was a final order; that thereafter, in pursuance of said order, a sale of the property was made by the master on December 10th, 1933, and the report of such sale and distribution of the proceeds was duly returned to the court; that on November 15th, 1934, an order was entered in the Superior Court of Cook County approving the master's report of sale and distribution; that by the master's report it was found that the sale was not made for a sufficient amount to pay the indebtedness which the trust deed was given to secure, and by the court referred to, it was ordered that the deficiency be assessed against the defendant, James Steffen, and the court found, was personally liable therefor, and in the same order the court found that the defendant had been satisfied in cash to the extent of \$44,771.02; that on November 25th, 1934, the receiver was directed to surrender possession of the premises to the defendant, O.K. Trust & Savings Bank, as trustee, and to file its final report and account, which was done, and that

on December 17th, 1934, the report of the receiver was approved and the receiver was discharged, and that such orders became final; that on October 4th, 1934, Albert Carter, a stranger to the proceeding, relying on the record, and without notice of any claimed rights of Lefkovits, purchased the fee title to the premises involved, and thereafter executed his notes and trust deed to the Chicago Title & Trust Company, as trustee, to secure a loan of \$9,000.00 on the premises; that on October 26th, 1934, the Oak Park Trust & Savings Bank as trustee, purchased the fee title to the premises from Albert Carter, relying on the record, and without any notice of any claimed rights of Lefkovits, or persons claiming under him, and that the Oak Park Trust & Savings Bank, as such trustee, is now the legal owner of said premises, and that it holds the title under Trust No. 1191 for the benefit of the depositing bondholders of the bond issue referred to; that on February 8th, 1933, relying on the record made in the Superior Court in such proceeding, and without any notice of any claimed rights of Lefkovits, one Philip C. Kessler, as real estate mortgagee, bought the Master's certificate of sale issued in pursuance of the sale hereinbefore referred to, for a valuable consideration, as security for a second mortgage on the premises, subject to the mortgage in foreclosure in this proceeding; that on February 9th, 1935, redemption was made from the Master's sale with the money borrowed on the trust deeds and notes, executed and delivered by Albert Carter to Kessler, to whom a certificate of redemption was issued, and that Kessler assigned the certificate of redemption to the Oak Park Trust & Savings Bank, as Trustee; that the original bond issue of \$60,000.00, \$47,000.00 of such bonds, due and unpaid, were deposited by the owners thereof, pursuant to a bondholders agreement, and that Lefkovits and one other, the owners of two bonds of \$500.00 each, refused, and still refuse, to deposit under the bondholders agreement, or to cooperate under such agreement; that on February 8th, 1935, Kessler, requested the Chicago

on December 17th, 1934, the report of the receiver was approved and the receiver was discharged, and that such orders became final; that on October 4th, 1934, Albert Barker, a stranger to the proceedings, relying on the record, and without notice of any claimed rights of Letkovits, purchased the fee title to the premises involved, and thereafter executed his notes and went back to the Chicago title & Trust Company, as trustee, to secure a loan of \$5,000.00 on the premises; that on October 10th, 1934, the Oak Park Trust & Savings Bank, as trustee, purchased the fee title to the premises from Albert Barker, relying on the record, and without any notice of any claimed rights of Letkovits, or persons claiming under him, and that the Oak Park Trust & Savings Bank, as such trustee, is now the legal owner of said premises, and that it holds the title under Trust No. 1191 for the benefit of the depositing beneficiaries of the bond issue referred to; that on February 8th, 1935, relying on the record made in the Superior Court in such proceeding, and without any notice of any claimed rights of Letkovits, one William J. Kessler, as real estate mortgage, bought the Master's certificate of sale issued in pursuance of the said mortgage, and before referred to, for a valuable consideration, as security for second mortgage in the premises, subject to the mortgage in foreclosure in this proceeding; that on February 17th, 1935, redemption was made from the Master's sale with the money borrowed on the first sale and notes, executed and delivered by Albert Barker to Kessler, to whom a certificate of redemption was issued, and that Kessler retained the certificate of redemption to the Oak Park Trust & Savings Bank, as trustee; that the original bond issue of \$50,000.00, 10% and 10% of such bonds, due and unpaid, were deposited by the master thereof, pursuant to a bondholders' agreement, and that Letkovits and one other, the owners of two bonds of \$500.00 each, refused, and still refuse, to deposit under the bondholders' agreement, or to cooperate under such agreement; that on February 8th, 1935, Kessler, requested the Chicago

Title & Trust Company to issue a mortgage guarantee policy in the sum of \$9,000.00, and that said Chicago Title & Trust Company refused to issue such policy unless and until Kessler deposited with the Chicago Title & Trust Company a sum of money adequate, in its opinion, to equal the proportionate share of income which Lefkovits and the other bondholder would receive out of the rents, issues and profits of the premises which were to be applied on the deficiency decree, and that Kessler did deposit with the Chicago Title & Trust Company the sum of approximately \$250.00 for that purpose; that Lefkovits has been notified to apply for his share of the money so deposited for his benefit, but that he refused, and still refuses, to do so; that the premises are held by the Oak Park Trust & Savings Bank, as trustee, under the trust hereinbefore mentioned, for the benefit of the bondholders, which bondholders have a beneficial interest in certificates issued to them, corresponding in proportionate value with the amount of bonds formerly held by them and secured by the trust deed; that petitioners were informed and believe that Lefkovits was offered his share of beneficial interest in certificates for his bonds, but that he refused to accept such certificates, and that the petitioners stand ready, willing and able to deliver such certificates to Lefkovits upon his presentation of bonds and his endorsement thereon of his acceptance of the certificates representing his share; that on June 21st, 1935, on motion of Lefkovits, an order was entered in the Superior Court of Cook County, vacating and setting aside the order of November 21st, 1934, confirming the sale of said property, and that thereafter on August 1st, 1935, on motion of Lefkovits, the Oak Park Trust & Savings Bank was appointed receiver for the premises, without the court requiring the petitioner to furnish bond; that the period of redemption from the sale made of the property on September 13th, 1934, expired on December 13th, 1935, and that thereafter the Oak Park Trust & Savings Bank, as receiver, filed

Title & Trust Company to issue a mortgage guarantee policy in the
sum of \$,000.00, and that said Chicago Title & Trust Company
refused to issue such policy unless and until certain deposits with
the Chicago Title & Trust Company a sum of twenty thousand, in its
opinion, to equal the proportionate share of income which Leikowitz
and the other bondholder would receive out of the rents, issues and
profits of the premises which were to be applied in the deficiency
decrease, and that Kessler did deposit with the Chicago Title & Trust
Company the sum of approximately \$20,000 for that purpose; that
Leikowitz has been notified to reply for his share of the money so
deposited for his benefit, but that he refused, and still refuses,
to do so; that the premises are held by the Oak Park Trust & Savings
Bank, as trustee, under the trust indenture executed, for the
benefit of the bondholders, which bondholders have a beneficial
interest in certificates issued to them, corresponding in proportion-
ate value with the amount of bonds formerly held by them and secured
by the trust deed; that said Leikowitz was informed and advised that
Leikowitz was ordered to deliver up his share of beneficial interest in certificates
for his bonds, but that he refused to accept such certificates, and
that the certificate holders are ready, willing and able to deliver such
certificates to Leikowitz upon his presentation of bonds and his
endorsement thereon of his acceptance of the certificates representing
his share; that on June 1st, 1935, an action of Leikowitz, in order
was entered in the Superior Court of Cook County, setting and setting
aside the order of November 1st, 1934, confirming the sale of said
property, and that thereafter on August 1st, 1935, on motion of
Leikowitz, the Oak Park Trust & Savings Bank was appointed receiver
for the premises, without the court requiring the receiver to
furnish bond; that the period of redemption from the sale made of the
property on September 15th, 1934, expired on December 15th, 1935, and
that thereafter the Oak Park Trust & Savings Bank, as receiver, filed

its final account and report from the period of the date of its qualification on August 5th, 1935, to December 14th, 1935, and prayed in its petition that the account be approved, and that it be instructed with reference to the distribution of the funds on hand, and be discharged as receiver, but that the Superior Court refused to approve such report and discharge the receiver, notwithstanding the fact that no objections were made to the report; that on February 3rd, 1936, Lefkovits filed a petition, praying that an order be entered vacating the sale, and that a new sale be ordered by the court; that on February 20th, 1936, almost two years after the approval of the Master's sale, an order was entered in the Superior Court of Cook County, vacating the order approving the sale of the property, and ordering that a new sale be had of the premises in accordance with the statute, and that ten days' notice of the time and place of the holding of the sale be given to all of the bondholders, and to all parties in interest; that the court did not require Lefkovits to furnish a bond to insure that a bid greater than the amount bid at the first sale would be forthcoming, or that the Master's fees and other incidental expenses would be paid. It is alleged in this petition that neither the Oak Park Trust & Savings Bank, as trustee nor in any other capacity, Albert H. Harms, the purchaser of the sale, nor any of the other parties in interest, were given any notice of any of the last mentioned proceedings, nor was notice served on the Chicago Title & Trust Company, as trustee, nor upon the owner of the reorganization mortgage above mentioned in the sum of \$9,000.00, nor upon the attorneys representing the plaintiff in the foreclosure proceeding. It also is alleged that on April 22nd, 1936, the semi-annual installment of interest on the \$9,000.00 note above referred to, becomes due and payable, and that the Oak Park Trust & Savings Bank, as receiver, is still collecting rents from the premises. In this petition, it is charged that at the time the order vacating the order of sale was entered by the Superior Court of Cook

its final account and report from the period of the date of its qualification on August 27th, 1935, to December 14th, 1935, and prayed in its petition that the account be approved, and that it be discharged with reference to the distribution of the funds on hand, and be such report and discharge the receiver, notwithstanding the fact that no objections were made to the report; that on February 2nd, 1936, Letkovitz filed a petition, praying that an order be entered vesting the sale, and that a new sale be ordered by the court; that on February 20th, 1936, almost two years after the approval of the receiver's sale, an order was entered in the Superior Court of Cook County, vesting the order approving the sale of the property, and ordering that a new sale be had of the premises in accordance with the statute, and that ten days' notice of the time and place of the holding of the sale be given to all of the bondholders, and to all parties in interest; that the court did not require Letkovitz to furnish a bond to insure that a bid greater than the amount bid at the first sale would be forthcoming, or that the receiver's fees and other incidental expenses would be paid. It is alleged in this petition that neither the Oak Park Trust & Savings Bank, trustees nor in any other capacity, Albert H. Hains, the purchaser of the sale, nor any of the other parties in interest, were given any notice of any of the last mentioned proceedings, nor was notice served on the Chicago Title & Trust Company, as trustee, nor upon the owner of the real estate mortgage above mentioned in the sum of \$3,000.00, nor upon the attorneys representing the plaintiff in the foreclosure proceedings. It is also alleged that on April 14th, 1936, the semi-annual installment of interest on the \$2,000.00 note above referred to, becomes due and payable, and that the Oak Park Trust & Savings Bank, as receiver, is still collecting moneys from the premises. In this petition, it is charged that at the time the order vesting the order of sale was entered by the Superior Court of Cook

County, that the court had lost jurisdiction of the subject matter, and was without power to enter such order. The petition alleges that all orders of the Superior Court subsequent to December 17th, 1934, except those pertaining to receivership prior to September 14th, 1935, were null and void, and the petition prays that such orders be so decreed, that the court determine the persons entitled to the sums in the fund, that the receiver be ordered to distribute the fund accordingly, and thereafter, that the receiver be discharged, and the costs of the proceedings be taxed against the respondent. The order vacating the order confirming the report of sale is as follows:

"On motion of William Feldman, solicitor for Samuel Lefkovits, one of the defendants and petitioner herein, due notice of the petition of Samuel Lefkovits filed June 4, 1935, having been served on all parties in interest and the court having read the petition and having heard evidence in support thereof and arguments of respective counsel and it appearing to the court that when the order to approve the Master's Report of Sale and Distribution was first presented, the court refused to sign it and after certain changes were made in the order and it was represented to the court by the counsel presenting the order that all non-depositing bondholders had notice, the court then signed the order and it now appearing that the non-depositors did not have notice and the court now being fully advised in the premises doth order that the order heretofore entered on November 21, 1934, confirming said sale be and the same is hereby vacated and set aside and held for naught."

The order dismissing the petition and from which this appeal is being prosecuted was entered on the motion of Lefkovits, which motion admits the facts well pleaded in the petition. It is to be noted that in its order of reference to the Master in the decree of sale, the court directed that all non-depositing bondholders be notified of the proposed sale, and as shown by the court's order in vacating the decree of sale, it is made upon the ground that Lefkovits was not so notified that the court set aside the sale. Lefkovits was served with summons and defaulted. In the foreclosure proceeding, service was had upon unknown owners by publication. Under the circumstances, this could have no possible application to Lefkovits. He was fully apprized of the proceeding by the summons served upon him, but he apparently did not choose to appear in court and present any claims

County, that the court had lost jurisdiction of the subject matter, and was without power to enter such order. The petition alleges that all members of the Superior Court suspended on December 17th, 1935, except those pertaining to receivership prior to September 1st, 1935, were null and void, and the petition prays that such orders be so declared, that the court determine the persons entitled to the funds in the fund, that the receiver be ordered to distribute the fund accordingly, and thereafter, that the receiver be discharged, and the costs of the proceedings be taxed against the respondent. The order vesting the order confirming the report of sale is as follows:

"On motion of William Feldman, solicitor for Samuel Lefkowitz, one of the defendants and petitioner herein, due notice of the petition of Samuel Lefkowitz filed June 4, 1935, having been served on all parties in interest and the court having read the petition and having heard evidence in support thereof and arguments of respective counsel and it appearing to the court that when the order to approve the receiver's report of sale and distribution was first presented, the court refused to sign it and after certain changes were made in the order and it was represented to the court by the counsel presenting the order that all non-appearing defendants had notice, the court then signed the order and it now appearing that the non-appearing defendants did not have notice and the court now being fully advised in the premises both orally and in writing that the order presented on November 31, 1934, confirming said sale and the time is hereby vacated and set aside and held for nemo."

The order dissolving the petition and from which this appeal is being prosecuted was entered on the motion of Lefkowitz, which motion admits the facts well pleaded in the petition. It is to be noted that in its order of reference to the Master in the matter of sale, the court directed that all non-appearing defendants be notified of the proposed sale, and as shown by the court's order in vacating the decree of sale, it is made upon the ground that Lefkowitz was not so notified that the court set aside the sale. Lefkowitz was served with summons and delivered. In the foregoing proceedings, service was had upon unknown persons by publication. Under the circumstances, this could have no possible application to Lefkowitz. He was fully apprised of the proceedings by the summons served upon him, but he apparently did not choose to appear in court and present any claims.

that he might have had. He could have preserved his rights by appearing in the case and if he was not satisfied with the order approving the sale, he could and should have appealed therefrom.

In Madison & Kedzie State Bank v. The Cicero-Chicago Corrugating Co., 351 Ill. 180, the Supreme Court said:

"This court has many times held, and it is not questioned in this case, that an order confirming or setting aside a sale, either in a foreclosure proceeding or in a proceeding for partition, is a final and appealable order. * * * Those decretal orders were under the control of the court during the term at which they were entered, and might have been modified, set aside or vacated during the term they were entered, or subsequently, upon motion made during the term and continued to a subsequent term. After the term expired the court was without power to change or modify the orders except as to matters of form or mere clerical errors or misprisions of the clerk, and the court was without power to set aside, vacate or annul the orders, as they were final and appealable orders."

See also Levy v. Broadway-Carmen Building Corp., 366 Ill. 279, and Straus v. Anderson, No. 23589 in the Supreme Court, not yet published.

We are of the opinion that the court was without jurisdiction to vacate the order confirming the sale of the property involved. It is, therefore, ordered that the order of the Superior Court of Cook County of June 21st, 1935, vacating the order approving the sale, be vacated, and that the petition on which such order was entered be dismissed; also, that the order of May 21st, 1936, dismissing the petition of the Oak Park Trust & Savings Bank, et al., be reversed and the cause remanded for a hearing on such petition as to the other matters therein set forth, including an accounting by the receiver now in control of the property, and that the court enter such orders as equity may require, to the end that the whole matter in issue be disposed of.

REVERSED AND REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

that he might have had. He could have presented his rights by appearing in the case and if he was not satisfied with the order approving the sale, he could and should have appealed therefrom.

In Madison & Keadie State Bank v. The Citizens' Savings

Company, 351 Ill. 180, the Supreme Court said:

"This court has many times held, and it is not questioned in this case, that an order confirming or setting aside a sale, either in a foreclosure proceeding or in a proceeding for partition, is a final and appealable order. * * * Those general orders were under the control of the court during the term in which they were entered, and might have been recalled, set aside, or vacated during the term they were entered, or subsequently, upon motion made during the term and continued to a subsequent term. After the term expired the court was without power to change or modify the orders except as to matters of form or mere clerical errors or misdirections of the clerk, and the court was without power to set aside, vacate or annul the orders, as they were final and appealable orders."

See also Levy v. The Citizens' Savings Company, 350 Ill. 178, and

Strawn v. Citizens' Savings Company, 350 Ill. 178, and

We are of the opinion that the order was without jurisdiction

to vacate the order confirming the sale of the property involved. It is, therefore, ordered that the order of the superior court of Cook County of June 1st, 1938, vacating the order approving the sale, be vacated, and that the petition on which such order was entered be dismissed; also, that the order of May 1st, 1938, dismissing the petition of the Oak Park Trust & Savings Bank, et al., be reversed and the cause remanded for a hearing on such petition as to the other matters therein set forth, including an accounting by the receiver now in control of the property, and that the court enter such orders as equity may require, to the end that the whole matter in issue be disposed of.

REVEREND AND HONORABLE THE JUDGE OF THE COURT.

DENIS E. SULLIVAN, C. J. AND JUDGE, J. J. COCHRAN.

39123

LOUISE DUDLEY,

Appellant,

v.

WILLIAM C. COOK, et al., Defendants
below.

THE COOK CORPORATION, a corporation,
Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

291 I.A. 611⁴

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against William C. Cook, the Cook Corporation and certain other persons, upon a charge of fraud and deceit. The charge is that the defendants, by false and fraudulent representations, on or about December 24, 1930, obtained a loan from plaintiff of the sum of \$40,000.00. Upon a trial of the cause in the Superior Court of Cook County before the court and a jury, the court directed the jury to find for defendant, the Cook Corporation. As to the other defendants, the jury disagreed and was discharged. The cause is here on plaintiff's appeal from a judgment against her for costs of suit.

It is claimed by plaintiff that in the month of December, 1930, the defendant Cook was a member of a syndicate, composed of William C. Cook, Moe A. Isaacs, Henry W. Angsten, Charles H. Eib and G. R. Lyman, and the object and purpose of the syndicate was to obtain control of the Pettibone-Mulliken Company of Chicago, and possibly to bring about a consolidation between that company and the Corey Steel Company and other companies; that Cook was a senior vice president of the Central Trust Company of Chicago, and a director of the Pettibone-Mulliken Company; that Isaacs for a number of years had been a financial promoter, and had been active in the reorganization of the Pettibone-Mulliken Company in 1928, and had become a large stockholder in that company and had taken active interest in its affairs; that Eib had been president and director of the Pettibone-Mulliken Company

2012

LOUISIANA

Appellant

v.

WILLIAM C. JOCK, et al., Defendants
Below.

THE COCK COMPANY, Inc., a corporation,
Appellee.

Appellee.

Settled

THE COURT HAS CONSIDERED THE MATTER OF THE CASE.

Plaintiff presents this action against William C. Jock, et al.,

Cock Corporation and certain other persons, upon a charge of fraud

and deceit. The charge is that the defendant, by means of fraudulent

representations, on or about December 24, 1920, obtained from the

plaintiff of the sum of \$40,000.00. Upon a trial of the case in the

superior court of Cook County before the court and a jury, the court

directed the jury to find for defendant, the Cock Corporation, as

to the other defendants, the jury disagreed and was discharged. The

cause is now on plaintiff's appeal from a judgment against her for

costs of suit.

It is claimed by plaintiff that in the month of December,

1920, the defendant Jock was a member of a syndicate, composed of

William C. Jock, Mrs. J. J. Jock, Henry J. Jock, Charles J. Jock and

G. H. Jock, and the object and purpose of the syndicate was to obtain

control of the telephone-exchange company of Chicago, and possibly to

bring about a consolidation between that company and the city-owned

company and other companies; that Jock was a leader and president

of the Central Trust Company of Chicago, and a director of the

Telephone-Exchange Company; that Jock was for a number of years had been

a financial promoter, and had been active in the reorganization of the

Telephone-Exchange Company in 1915, and had become a large stockholder

in that company and had taken active interest in its affairs; that

it had been president and director of the Telephone-Exchange Company

since 1928; that Angsten was president of the Corey Steel Company, and had been a director of the Pettibone-Mulliken Company. Lyman, plaintiff's son-in-law, was vice president of the Pettibone-Mulliken Company, and had become a director on January 2, 1931. In the complaint filed, it is alleged that the business of the company had been steadily declining, and had showed a large loss at the close of the fiscal year, October 31, 1930, and that this loss was accentuated during the following months of November and December. It is alleged that the common stock of the company was listed on the Chicago Curb Exchange, but that there were no sales of such stock from the last of August, 1930, to December 27, 1930, and that on the last mentioned date, a sale was made of a portion of such stock at a price of 2-5/8 per share; also, that there were no sales on the curb exchange for more than \$4.00 per share, and that all but one or two sales were made for less, and that after April, 1931, there were no further sales during that year. It is also charged that for about six weeks prior to December 1st, 1930, Cook and the other syndicate members had been endeavoring to sell the common stock of the Pettibone-Mulliken Company, but had been unable to do so, and that Lyman had gone to New York about the first of November of that year, on behalf and at the expense of the syndicate, and remained there until December 21st, 1930, endeavoring to sell the stock; that he had offered it at \$10.00 per share, and later to certain individuals at a lower price, but was unable to sell any of the said stock; that Eib and Isaacs had also made one or more trips to New York for the same purpose, but that they were unable to make any sales; that a few days prior to December 21, 1930, the syndicate purchased approximately 15,000 shares of the common stock of the Pettibone-Mulliken Company for an average price of approximately \$3.79 per share, and that just prior to December 21, 1930, Isaacs and Lyman, having failed to sell any of the stock, attempted to borrow money for the syndicate's use, but were unable to do so;

since 1928; that Angster was president of the Cory Motor Company, and had been a director of the Pettibone-Bulliken Company. Lyman, plaintiff's son-in-law, was vice president of the Pettibone-Bulliken Company, and had become a director on January 7, 1931. In the complaint filed, it is alleged that the business of the company had been steadily declining, and had shown a large loss at the close of the fiscal year, October 31, 1930, and that this loss was accumulated during the following months of November and December. It is alleged that the common stock of the company was listed on the Chicago Board Exchange, but that there were no sales of such stock from the last of August, 1930, to December 31, 1930, and that on the last mentioned date a sale was made of a portion of such stock at a price of \$2 5/8 per share; also, that there were no sales on the said exchange for more than \$4.00 per share, and that all but one or two sales were made for less, and that after April, 1931, there were no further sales during that year. It is also charged that for about six weeks prior to December 1st, 1930, Cook and the other syndicate members had been endeavoring to sell the common stock of the Pettibone-Bulliken Company, but had been unable to do so, and that Lyman had gone to New York about the first of November of that year, on behalf and at the expense of the syndicate, and remained there until December 1st, 1930, endeavoring to sell the stock; that he had offered it at \$10.00 per share, and later to certain individuals at a lower price, but was unable to sell any of the said stock; that Lip and Isaac had also made one or more trips to New York for the same purpose, but that they were unable to make any sales; that a few days prior to December 1, 1930, the syndicate purchased approximately 13,000 shares of the common stock of the Pettibone-Bulliken Company for an average price of approximately \$3.75 per share, and that just prior to December 31, 1930, Isaac and Lyman, having failed to sell any of the stock, attempted to borrow money for the syndicate's use, but were unable to do so;

that Isaacs ascertained that Lyman's mother-in-law, the plaintiff here, had recently been left a little more than \$40,000.00 upon the death of her husband, who had been employed by the Baltimore & Ohio Railroad, and began to scheme to take possession of this money and formed a plan to defraud the plaintiff; that by false representations as to his purpose, he persuaded Lyman's wife, the plaintiff's daughter, to invite her mother to New York from her home in Baltimore, and that on December 21, 1930, plaintiff went to New York and there met Isaacs; that Isaacs, with intent to deceive plaintiff, maliciously, falsely and fraudulently, stated to her that the company was in good financial condition, that the syndicate desired to obtain control of this company and to effect a consolidation with the Corey Steel Company and other companies, and asked plaintiff for a loan of \$40,000.00 to the syndicate for that purpose; that Isaacs represented to plaintiff that the members of the syndicate were men of large financial means, and stated that every member would stand behind the loan personally, and in addition, she would receive collateral of equal value to the loan as further security, and that the syndicate would pay her five and one-half percent per annum, that the syndicate would repay by a short date, not to exceed thirty days, together with a bonus of \$5,000.00; that the plaintiff, relying upon such promise, obtained a check for \$40,000.00 from the Baltimore & Ohio Railroad, and, together with Isaacs, went to the office of Cook at the Central Trust Company of Chicago, and in the presence of Cook, Isaacs maliciously made false and fraudulent statements as to the financial standing of the company, and that Cook knew that the representations as to the standing of the company were false; that the defendant offered to plaintiff 4,000 shares of the common stock of the Pettibone-Mulliken Company as collateral for the loan made to the syndicate, and then and there fraudulently stated that the stock was of the value of \$40,000.00, although he, Cook, knew at the time that this statement

that Isaac ascertained that Myron's mother-in-law, the plaintiff here, had recently been left a little more than \$40,000.00 upon the death of her husband, who had been employed by the Baltimore & Ohio Railroad, and began to scheme to take possession of this money and formed a plan to defraud the plaintiff; that by false representations as to his purpose, he persuaded Myron's wife, the plaintiff's daughter, to invite her mother to New York from her home in Baltimore, and that on December 21, 1930, plaintiff went to New York and there met Isaac; that Isaac, with intent to deceive plaintiff, maliciously, falsely and fraudulently, stated to her that the company was in good financial condition, that the syndicate desired to obtain control of this company and to effect a consolidation with the Jersey Steel Company and other companies, and asked plaintiff for a loan of \$40,000.00 to the syndicate for that purpose; that Isaac represented to plaintiff that the members of the syndicate were men of large financial means, and stated that every member would stand behind the loan personally, and in addition, and would receive collateral of equal value to the loan as further security, and that the syndicate would pay her five and one-half percent per annum, that the syndicate would repay by a short date, not to exceed thirty days, together with a bonus of \$5,000.00; that the plaintiff, relying upon such promise, obtained a check for \$40,000.00 from the Baltimore & Ohio Railroad, and, together with Isaac, went to the office of Cook at the Central Trust Company of Chicago, and in the presence of Cook, Isaac maliciously made false and fraudulent statements as to the financial standing of the company, and that Cook knew that the representations as to the standing of the company were false; that the defendant offered to plaintiff \$4,000 as part of the common stock of the Pittsburgh-Milwaukee Company as collateral for the loan made to the syndicate, and then and there fraudulently stated that the stock was of the value of \$40,000.00, although he, Cook, knew at the time that this statement

was untrue; that at the time plaintiff delivered the check to Cook, both Cook and Isaacs stated to plaintiff that she was to hold the stock as collateral security for the loan to them, and that upon repayment of the loan within thirty days, she should return the stock to Cook and Isaacs, and that the stock was not to be placed in her name, but was to be held so as to reserve the voting power in the syndicate; that relying upon the representations made by Cook and Isaacs, she endorsed the check to the order of Cook, and gave it to him as treasurer of the syndicate only as a loan, and that thereafter Cook procured for her a safety deposit box in the vault of the Central Trust Company, where plaintiff placed the stock for safe keeping. It is further alleged that immediately thereafter, Cook cashed the check and appropriated \$20,000.00 of the proceeds thereof to his own use, and applied the balance toward the payment of notes in the principal sum of \$10,000.00 each of Angsten and Eib, payable to the Central Trust Company. She alleges that thereafter, for the purpose of placating plaintiff, and to keep her in ignorance of the fraud as long as possible, defendant purchased certain preferred stock of the Pettibone-Mulliken Company at a low price, and induced the board of directors of the company to retire it at a profit of \$2,500.00, which they paid plaintiff on account of the bonus so promised her. In her declaration, plaintiff tenders back the stock.

It is the contention of defendant Cook that the plaintiff purchased the stock, and that the money received by him was in no sense a loan.

Cook was called by plaintiff as a witness under Section 60 of the Practice Act, and testified that he was a banker, had been connected with various banks, and that at the time of the transaction in question, he was vice president of the Central Trust Company of Chicago; that he was a director of the Pettibone-Mulliken Company, Corey Steel Company, Northern Illinois Coal Company and the Cook

was untrue; that at the time Plaintiff delivered the check to Cook,
both Cook and Lassar stated to Plaintiff that she was to hold the
stock as collateral security for the loan to them, and that upon repay-
ment of the loan within thirty days, she should return the stock to
Cook and Lassar, and that the stock was not to be placed in her name,
but was to be held so as to reserve the voting power in the syndicate;
that relying upon the representations made by Cook and Lassar, she
endorsed the check to the order of Cook, and gave it to him as treasurer
of the syndicate only as a loan, and that thereafter Cook procured for
her a safety deposit box in the vault of the Central Trust Company,
where Plaintiff placed the stock for safe keeping. It is further
alleged that immediately thereafter, Cook cashed the check and
appropriated \$20,000.00 of the proceeds thereof to his own use, and
applied the balance toward the payment of notes in the principal sum
of \$10,000.00 each of Angsten and Eld, payable to the Central Trust
Company. She alleges that thereafter, for the purpose of placing
Plaintiff, and to keep her in ignorance of the funds as long as possible,
defendant purchased certain preferred stock of the Lottbom-Mulliken
Company at a low price, and induced the board of directors of the
company to retire it at a profit of \$2,500.00, which they paid Plaintiff
on account of the bonus so promised her. In her declaration, Plaintiff
tenders back the stock.
It is the contention of defendant Cook that the Plaintiff
purchased the stock, and that the money received by him was in no
sense a loan.
Cook was called by Plaintiff as a witness under Section 30
of the Practice Act, and testified that he was a banker, had been
connected with various banks, and that at the time of the transaction
in question, he was vice president of the Central Trust Company of
Chicago; that he was a director of the Lottbom-Mulliken Company,
Cory Steel Company, Northern Illinois Coal Company and the Cook

Corporation, and that he was, at the time of testifying, president of The Cook Corporation, in which there are no stockholders outside of his family; that Eib was president and director of the Pettibone-Mulliken Company, and Angsten a director. He further testified that he had known Moe Isaacs for ten years, and that Isaacs was very substantially interested in the Pettibone-Mulliken Company; that he had agreed with Angsten, Eib and Issacs to put up some money to assist them in purchasing \$60,000.00 worth of stock of the Pettibone-Mulliken Company for resale; that Isaacs claimed he knew where he could buy a block of stock in this company, that he wanted to get control of it, if possible, and wanted to know if the witness would assist him in purchasing, not to exceed \$60,000.00 worth of such stock; that Isaacs stated that he knew where he could buy the stock and where he could sell it, and that the witness was to get one quarter of the profit, and that Lyman was not a part of the syndicate; that Angsten put up \$7,000.00 in cash and that the witness discounted his, Angsten's, note for \$10,000.00 with stock of the corporation as collateral with the Central Trust Company; that Eib put up \$10,000.00 in cash which was obtained upon a note for \$10,000.00, which note was deposited with the bank as collateral for the \$10,000.00. The witness stated that he put up \$20,000.00, which he procured from The Cook Corporation. He stated that Mrs. Dudley came to the bank at 208 South La Salle Street, Chicago, and gave the witness a check from the Baltimore & Ohio Railroad for \$40,000.00, and that he used the proceeds to pay Eib's note for \$10,000.00 and Angsten's note for \$10,000.00, and in addition, took \$20,000.00 which he, the witness, had advanced, and which \$20,000.00 he turned over to The Cook Corporation, from which he had borrowed the money, and that he turned over to Mrs. Dudley 4,000 shares of stock.

Plaintiff testified that she resided in Baltimore, Maryland; that in December, 1930, she met one Moe A. Isaacs at the Commodore

corporation, and that he was, at the time of testifying, president of The Cook Corporation, in which there are no stockholders outside of his family; that Lip was president and director of the Pettibone-Mulliken Company, and ingested a director. He further testified that he had known for Isaac for ten years, and that Isaac was very substantially interested in the Pettibone-Mulliken Company; that he had agreed with ingested, Lip and Isaac to put up some money to assist them in purchasing 60,000.00 worth of stock of the Pettibone-Mulliken Company for resale; that Isaac claimed he knew where he could buy a block of stock in this company, that he wanted to get control of it, if possible, and wanted to know if the witness would assist him in purchasing, not to exceed 60,000.00 worth of such stock; that Isaac stated that he knew where he could buy the stock and where he could sell it, and that the witness was to get one quarter of the profit, and that Isaac was not a part of the syndicate; that ingested put up 17,000.00 in cash and that the witness advanced him, ingested's note for 10,000.00 with stock of the corporation as collateral with the Central Trust Company; that Lip put up 15,000.00 in cash which was obtained upon a note for 15,000.00, which note was deposited with the bank as collateral for the 15,000.00. The witness stated that he put up 30,000.00, which he procured from The Cook Corporation. He stated that Mrs. Dudley came to the bank at 208 South La Salle Street, Chicago, and gave the witness a check from her for 10,000.00 Ohio Railroad for 10,000.00, and that he used the proceeds to pay Lip's note for 10,000.00 and ingested's note for 15,000.00, and in addition, took 10,000.00 which he, the witness, had advanced, and which 10,000.00 he turned over to The Cook Corporation, from which he had borrowed the money, and that he turned over to Mrs. Dudley 4,000 shares of stock.

Witness testified that he resided in Baltimore, Maryland; that in December, 1890, the first one Mrs. A. Isaac at the Commodore

Hotel in New York, at which meeting her daughter and her husband, one G. R. Lyman, were present; that in the presence of her daughter and son-in-law, Isaacs stated to the plaintiff, in substance, that he desired to borrow money, and that there was a syndicate of responsible men, consisting of W. O. Cook, one of the defendants here, whom Isaacs stated, was the vice president of the Central Trust Company, one Angsten, vice president of the Corey Steel Company, and one Mr. Eib, president of the Pettibone-Mulliken Company, who were interested in the proposed loan; that Isaacs stated to her at this time that if she would make the loan, the persons mentioned would stand back of plaintiff, and that Isaacs promised her that these gentlemen would be responsible for the loan, should she make it; that "they" would want the money for about thirty to sixty days, and that plaintiff would be paid five and one-half per cent interest on such loan, together with a bonus of from \$5,000.00 to \$7,500.00. This witness stated that thereafter she came from Baltimore to Chicago with a check for \$40,000.00, and at Chicago she was met by her daughter and her daughter's husband; that together with Lyman, her son-in-law, she went to Isaac's office, and that from Isaac's office they proceeded to the office of defendant Cook; that she turned the check over to Cook, and that "they" said she would get 4,000 shares of Pettibone-Mulliken stock, which was very good, and that when the \$40,000.00 was returned to the witness, she should return the stock to "them", and that this whole conversation took place in the presence of defendant Cook. This witness further testified that at this time she told Cook that it was all the money she had, and that "they" said the common stock of the Pettibone-Mulliken Company was well worth \$40,000.00, and that at this conversation, Isaacs stated to her that the stock was then selling at \$10.00 a share on the market; that "they" did not give the witness a note or memorandum, and that she did not ask for it, inasmuch as she had never had any dealings

Hotel in New York, at which meeting her daughter and her husband, one G. H. Lyman, were present; that in the presence of her daughter and son-in-law, Isaac stated to the plaintiff, in substance, that he desired to borrow money, and that there was a syndicate of respectable men, consisting of J. U. Cook, one of the defendants here, whom Isaac stated, was the vice president of the National Trust Company, one Angsten, vice president of the Jersey Trust Company, and one Mr. Rip, president of the Pettibone-Mulliken Company, who were interested in the proposed loan; that Isaac stated to her at this time that if she would make the loan, the persons mentioned would sign work of plaintiff, and that Isaac promised her that these gentlemen would be responsible for the loan, should she make it; that "they" would want the money for about thirty to sixty days, and that plaintiff would be paid five and one-half per cent interest on each loan, together with a bonus of from \$5,000.00 to \$7,000.00. This witness stated that thereafter she came from Baltimore to Chicago with a check for \$40,000.00, and at Chicago she was met by her daughter and her daughter's husband; that together with Lyman, her son-in-law, she went to Isaac's office, and that from Isaac's office they proceeded to the office of defendant Cook; that she turned her check over to Cook, and that "they" said she would get 4,000 shares of Pettibone-Mulliken stock, which was very good, and in a week the \$40,000.00 was returned to the witness, and should return the stock to "them", and that this whole conversation took place in the presence of defendant Cook. This witness further testified that at this time she told Cook that it was all the money she had, and that "they" said the common stock of the Pettibone-Mulliken Company was worth \$40,000.00, and that at this conversation, Isaac stated to her that the stock was then selling at \$10.00 a share on the market; that "they" did not give her witness a note or memorandum, and that she did not ask for it, inasmuch as she had never had any dealings

in financial matters, or business experience; that upon the suggestion of Cook, she got a safety deposit box to put the stock in, so that the stock would be available in case "they" should need it, and that the box should be in the joint name of her daughter and herself, and that this was done; that there was quite an argument as to who should pay for the box, and that eventually, her son-in-law paid for it. She testified that thereafter Isaacs told her that "they" wanted to use the stock for collateral in the reorganization of the Pettibone-Muliken Company, and that the witness still had the 4,000 shares of stock. She stated that she had frequently told Isaacs that she desired to talk to Cook about the matter, but that Isaacs told her not to do so because it would complicate matters, and that he, Isaacs, would straighten it out and the witness would be allright, and that because of Isaac's statement in this regard, she did not consult further with Cook. She stated that she received \$2,500.00 on account of the bonus right after the loan, from Isaacs, and that Isaacs promised her that the balance would be paid, but that he kept putting her off; that she was paid interest by Isaacs on the \$40,000.00 up to May 1st, 1933, when certain notes were given to her by parties other than Cook, and that interest was figured on \$40,000; that since May 1st, 1933, Mr. Eib had been paying interest on his note, that Mr. Angsten had paid her \$3,500.00 after he went into bankruptcy, and that her son-in-law has been paying her five and one half per cent. on his note. On cross-examination, she stated that as she was about to go downstairs to the safety deposit box, Cook told her to be sure and return the stock when the \$40,000.00 was paid; that the time of the conversation was about 11 o'clock on the morning of December 24th, 1930; that she had made no demand on Cook for interest or principal, and that she had no further dealings with Cook because she was not supposed to do so; that about two or three months after she had made

in financial matters, or business experience; that upon the suggestion of Cook, she got a safety deposit box to put the stock in, and that the stock would be available in case "they" would need it, and that the box should be in the joint name of her son-in-law and herself, and that this was done; that there was quite an argument as to who should pay for the box, and that eventually, her son-in-law paid for it. She testified that thereafter Isaac told her that "they" wanted to use the stock for collateral in the reorganization of the Patterson-Bulliken Company, and that the witness still had the 4,000 shares of stock. She stated that she had frequently told Isaac that she desired to talk to Cook about the matter, but that Isaac told her not to do so because it would complicate matters, and that he, Isaac, would straighten it out and the witness would be alright, and that because of Isaac's statement in this regard, she did not consult further with Cook. She stated that she received \$2,500.00 on account of the bonus right after the loan, from Isaac, and that Isaac promised her that the balance would be paid, but that he kept putting her off; that she was paid interest by Isaac on the \$2,500.00 up to May 1st, 1935, when certain notes were given to her by parties other than Cook, and that interest was figured on \$2,500.00; that since May 1st, 1935, Mr. Rip had been paying interest on his note, that Mr. Angsten had paid her \$2,500.00 after he went into bankruptcy, and that her son-in-law has been paying her five and one half per cent. on his note. On cross-examination, she stated that as she was about to go downstairs to the safety deposit box, Cook told her to be sure and return the stock when the \$2,500.00 was paid; that the time of the conversation was about 11 o'clock on the morning of December 24th, 1930; that she had made no demand on Cook for interest or principal, and that she had no further dealings with Cook because she was not supposed to do so; that about two or three months after she had made

the loan, and she had not received any interest thereon, she made a demand upon Isaacs, and that thereafter Lyman, Angsten, Eib and Isaacs began to pay her interest, and that they continued to pay interest until May, 1933; that she had Isaacs' note, Eib's note and Lyman's note, and that the only reason she did not see Mr. Cook further about the matter, was because she was told not to by the other parties.

Over defendant's objection, the following document was received in evidence, and submitted to the jury:

"State of Illinois } ss.
County of Cook

The undersigned does hereby state that he was a member of a syndicate composed of William C. Cook, Charles H. Eib, Henry W. Angsten and George R. Lyman, all of Chicago, Illinois, beginning in the year 1930 and thereafter. Said syndicate was formed for the purpose of securing Common capital stock of Pettibone-Mulliken Company, a Delaware corporation, with principal offices in the City of Chicago.

In the months of November and December, 1930, the said Lyman went to New York as a representative of said syndicate to raise funds for said syndicate by the sale of Pettibone-Mulliken Common Stock; that about the middle of December, 1930, the undersigned joined said Lyman in New York City. The said Lyman was not successful in raising funds and the said Lyman then suggested the possibility of including Mrs. Louise Dudley of Baltimore, Maryland to loan money to the syndicate, and that thereupon the said Lyman telephoned Mrs. Dudley and asked her to meet Lyman and the undersigned in New York City, which Mrs. Dudley did. After the said Lyman had acquainted Mrs. Dudley with the situation, Mrs. Dudley agreed to loan the sum of Forty Thousand Dollars (\$40,000) to the syndicate upon the understanding that she would be protected and would be repaid with interest at the rate of five and one-half per cent (5-1/2%) per annum, together with a premium to be decided upon. Thereafter the undersigned and the said Lyman returned to Chicago, arriving on the morning of December 23, 1930; that immediately upon such arrival, the undersigned and Lyman informed the said Eib and Angsten of Mrs. Dudley's willingness to make a loan.

On the following day, December 24, 1930, Mrs. Dudley arrived in Chicago from Baltimore, and immediately in company with the undersigned and the said Lyman went to Mr. Cook's office in the Central Trust Company, where Mrs. Dudley delivered to the said Cook a check from the Baltimore & Ohio Railroad Relief Fund for Forty Thousand (\$40,000) payable to her and by her endorsed as a loan to said syndicate, upon the terms hereinbefore mentioned; and that thereupon the said Cook delivered certificates representing four thousand (4,000) shares of Common capital stock of Pettibone-Mulliken Company to Mrs. Dudley as collateral for said loan.

Subsequent to the aforesaid, the undersigned paid to Mrs. Dudley the sum of Twenty-five Hundred Dollars (\$2500.00)

the loan, and she had not received any interest thereon, she made demand upon Isaac, and that thereafter Lyman, Angsten, Ed and Isaac began to pay her interest, and that they continued to pay interest until May, 1937; that she had Isaac's note, Ed's note and Lyman's note, and that the only reason she did not see Mr. Cook further about the matter, was because she was told not to by the other parties.

Over defendant's objection, the following document was

received in evidence, and submitted to the jury:

"State of Illinois }
County of Cook }

The undersigned does hereby state that he is a member of a syndicate composed of William U. Cook, Charles M. Ed, Henry A. Angsten and George E. Lyman, all of Chicago, Illinois, dealing in the year 1930 and thereafter. This syndicate was formed for the purpose of securing common control of the telephone company, a Delaware corporation, with principal offices in the City of Chicago.

In the month of November and December, 1930, the said Lyman went to New York as a representative of said syndicate to raise funds for said syndicate by the sale of telephone-stocks. Common stock; that about the middle of December, 1930, the undersigned joined said Lyman in New York City. The said Lyman was not successful in raising funds and the said Lyman then suggested the possibility of including the phone company of Baltimore, Maryland, in the syndicate, and that thereupon the said Lyman telephoned Mrs. Dudley and asked her to meet Lyman and the undersigned in New York City, which Mrs. Dudley did. After the said Lyman had conversed with Mrs. Dudley and the said Lyman agreed to loan the sum of forty thousand dollars (\$40,000) to the syndicate upon the understanding that she would be protected and would be repaid with interest at the rate of five and one-half per cent (5-1/2%) per annum, together with a premium to be decided upon. Thereafter the undersigned and the said Lyman returned to Chicago, arriving on the morning of December 22, 1930; in a letter immediately upon such arrival, the undersigned and Lyman informed the said Ed and Angsten of Mrs. Dudley's willingness to make a loan.

On the following day, December 23, 1930, Mrs. Dudley arrived in Chicago from Baltimore, and immediately in company with the undersigned and the said Lyman went to Mr. Cook's office in the Central Trust Company, where Mrs. Dudley delivered to the said Cook a check from the Baltimore & Ohio Railroad Relief Fund for forty thousand (\$40,000) payable to her and by her endorsed as a loan to said syndicate, upon the terms hereinbefore mentioned; and that thereupon the said Cook delivered certificates representing four thousand (\$4,000) shares of common capital stock of Baltimore-Whitaker Company to Mrs. Dudley as collateral for said loan.

Subsequent to the foregoing, the undersigned said to Mrs. Dudley the sum of twenty-five hundred dollars (\$2500.00)

on account of said loan. Subsequent to Mrs. Dudley's loan to the syndicate, the said Cook withdrew from the syndicate and the said Eib, Lyman, Angsten and the undersigned agreed to pay the interest due Mrs. Dudley on said loan; and that the undersigned has paid his share of interest from time to time to date and has delivered his note to Mrs. Dudley, as set forth in an agreement signed by her this day.

Dated as of May 1, 1933.

(Signed) M. A. Isaacs

Witnesses to signature of M. A. Isaacs:

(Signed) Leon R. Gross
Meyer B. Weissman"

There was received in evidence a statement signed by plaintiff to the effect that in consideration of the receipt of Isaacs's note for \$13,500.00 dated May 1, 1933, payable one year after date, she would institute no legal proceedings against Isaacs; also, the following document:

"This agreement, made and entered into this tenth day of September, 1932, by and between Louise Dudley of the City of Baltimore, County of Baltimore, State of Maryland, hereinafter known as party of first part, and G. R. Lyman of the City of Chicago, County of Cook, State of Illinois, hereinafter known as party of second part:

Witnesseth That

Whereas: Party of first part did make and invest in a syndicate composed of M. A. Isaacs, C. H. Eib, H. W. Angsten and G. R. Lyman, within the month of December, 1930, Forty Thousand Dollars (\$40,000.00) receipt whereof is hereby acknowledged by syndicate; to assist syndicate in acquiring certain securities of Pettibone-Mulliken Company and as security party of first part was given four thousand shares (4,000) Common stock of Pettibone-Mulliken Company. The investment being guaranteed by four syndicate members, liability of each limited to Ten Thousand Dollars (\$10,000.00). Said investment was made on the recommendation of M. A. Isaacs and G. R. Lyman with the understanding, knowledge and consent of other syndicate members:

Whereas: M. A. Isaacs, C. H. Eib, H. W. Angsten and G. R. Lyman, of said syndicate, are desirous to protect and reimburse party of first part and each have agreed and will enter into like agreement with party of first part;

Now Therefore: In consideration of the premises and of the promises and agreements of all parties hereto, as hereinafter set forth, it mutually is agreed by and between said parties as follows:

No. 1. Party of second part will give and assign to party of first part, First Mortgage Bonds due 1943 of Pettibone-Mulliken Company, a corporation of the State of Delaware, having its principal office at 4710 West Division Street, City of Chicago, County of Cook, State of Illinois, in the amount of Ten Thousand Dollars (\$10,000.00) face value of bonds.

No. 2. In the event Pettibone-Mulliken Company is reorganized, refinanced or its capital structure revised or changed requiring an exchange of securities including First Mortgage Bonds, party of first part will comply with such request for

exchange and accept such securities as will be exchanged for said First Mortgage Bonds.

No. 3. Party of second part hereby binds and pledges himself to give party of first part in cash United States Currency Gold Standard, an amount sufficient to make up the difference between the liquidated values of said securities and Ten Thousand Dollars (\$10,000.00) provided, however, that liquidated value of said securities is less than Ten Thousand Dollars (\$10,000.00).

No. 4. Party of first part does hereby agree in case liquidated value of said securities is in excess of Ten Thousand Dollars (\$10,000.00) to pay to party of second part the sum of monies received in excess of said Ten Thousand Dollars (\$10,000.00).

No. 5. It is mutually understood and agreed by all parties hereto that party of first part shall not liquidate said securities until three months after date first above written.

No. 6. Party of first part hereby agrees that any interest which may be due or become due and paid on said securities that such interest will be credited to interest as provided for in Paragraph No. 7.

No. 7. Party of second part does agree to pay to party of first part, interest at the rate of Five and One-half per centum per annum on Ten Thousand Dollars (\$10,000.00) payable on or before the Tenth day of each calendar month beginning with month of October, 1932, and continuing thereafter until liquidation of securities as provided for in paragraphs Nos. 3, 4 and 5.

This agreement shall enure to and be binding upon heirs, executors and administrators of party of second part.

In Witness Whereof, the parties hereto have duly executed this agreement the day and year first above written.

Louise Dudley,
Party of First Part.

G. R. Lyman,
Party of Second Part.

On this 17th day of Sept. 1932, before me, a Notary Public in and for the County of Cook, State of Illinois, appeared Louise Dudley to me personally known to be the same person whose name is subscribed in the foregoing instrument, and acknowledged that she executed said instrument as her free and voluntary act and for the uses and purposes therein expressed.

Witness my hand and seal the day and year last above given.

William J. Hopkins,
Notary Public."

E. T. Lindgren, a witness for plaintiff, testified that at the time of the trial, he was assistant secretary of the Chicago Curb Exchange, and had a record of sales of stock made through such exchange; that from August to December, 1930, there were no sales of Pettibone-Mulliken Company common stock; that in December of that year, there were 4,150 shares traded, - 4 was high and 2-5/^{low}/₈ that in January,

exchange and account such securities as will be exchanged for said
First Mortgage Bonds.

No. 3. Party of second part hereby binds and obliges
himself to give party of first part in cash United States

Currency Gold Standard, an amount sufficient to make up the
difference between the liquidated value of said securities and
Ten Thousand Dollars (\$10,000.00) provided, however, that
liquidated value of said securities is less than Ten Thousand
Dollars (\$10,000.00).

No. 4. Party of first part does hereby agree in case
liquidated value of said securities is in excess of Ten Thousand
Dollars (\$10,000.00) to pay to party of second part the sum of

monies received in excess of said Ten Thousand Dollars (\$10,000.00).
No. 5. It is mutually understood and agreed by all parties
hereto that party of first part shall not liquidate said securi-

ties until three months after date first above written.
No. 6. Party of first part hereby agrees that any interest
which may be due or become due and paid on said securities that

such interest will be credited to interest as provided for in
Paragraph No. 7.

No. 7. Party of second part does agree to pay to party
of first part, interest at the rate of five and one-half per

centum per annum on Ten Thousand Dollars (\$10,000.00) payable
on or before the Tenth day of each calendar month beginning with

month of October, 1930, and continuing thereafter until liquidation
of securities as provided for in paragraph Nos. 3, 4 and 5.

This agreement shall remain in full force and be binding upon heirs,
executors and administrators of party of second part.

In witness whereof, the parties hereto have duly executed
this agreement the day and year first above written.

Louise Gublay,
Party of first part.

G. R. Lyman,
Party of second part.

On this 17th day of Sept. 1930, before me, a Notary Public
in and for the County of Cook, State of Illinois, appeared Louise
Gublay to me personally known to be the same person whose name
is subscribed in the foregoing instrument, and acknowledged that
she executed said instrument as her free and voluntary act and
for the uses and purposes therein expressed.

William J. Hopkins,
Notary Public.

E. T. Lindgren, a witness for Plaintiff, testified that at
the time of the trial, he was assistant secretary of the Chicago Corp

Exchange, and had a record of sales of stock made through such exchange;
that from August to December, 1930, there was no sale of testimony

William Company common stock; that in December of that year, there
were 4,150 shares traded, - 4 was high and - 2 1/2 low in January,

1931, there were 450 shares traded, - $3\frac{7}{8}$ was high and $2\frac{1}{2}$ was low, and that he meant ^{high and low} in dollars. On cross-examination, he stated that in August, 1933, there were 183 shares traded, - $5\frac{1}{4}$ was high and 5 was low, and in July of that year, 1350 shares were traded, - 8 was high and $5\frac{1}{4}$ low.

Ruby L. Lyman, daughter of the plaintiff, testified to the effect that she was with her ^{mother} when she met Isaacs in New York, as hereinbefore related by plaintiff; that Isaacs told her mother that "they" were unable to sell stock in the Pettibone-Mulliken Company, and that "they" wanted to borrow money; that Isaacs asked plaintiff if she would loan "them" about \$40,000 or \$50,000, and stated that if she did so, she would make a profit, and that it would be absolutely sure that she would not lose her money, and that the loan would be for only between thirty and sixty days; that Isaacs told plaintiff the nature of it, and that these men wanted to buy up the stock and sell it; that Cook was vice president of the Central Trust Company, and a very substantial and worthwhile man of Chicago, and in all probability would be the next president of the bank; that Cook was also a director of the Pettibone-Mulliken Company, and with a man like that taking care of the stock, there was no way for plaintiff to lose a penny; that Eib was president of the Pettibone-Mulliken Company, Angsten was president of the Corey Steel Company and Isaacs had dealt in stocks and made lots of money, and at one time was president of a New York City bank; that Isaacs stated to plaintiff that he had over \$80,000 worth of gold notes in the Pettibone-Mulliken Company, and that they were then trying to reorganize the company, and that was the purpose in buying the stock. This witness testified to the effect that Isaacs suggested that the stock be transferred to the name of the witness. On cross-examination, this witness stated that in the New York conversation between plaintiff and Isaacs, Isaacs stated, in effect, that he represented the syndicate, and desired to borrow money

1931, there were 480 shares traded, - 3-7/8 was high and 2-1/2 was low, and that he meant in dollars. On cross-examination, he stated that in August, 1933, there were 183 shares traded, - 2-1/4 was high and 2 was low, and in July of that year, 1930 shares were traded, - 8 was high and 5-1/4 low.

Ruby A. Lyman, daughter of the plaintiff, testified to the effect that she was with her mother when she met Isaac in New York, as hereinafter related by plaintiff; that Isaac told her mother that "they" were unable to sell stock in the Testiphone-Mulliken Company, and that "they" wanted to borrow money; that Isaac asked plaintiff if she would loan "them" about 40,000 or 50,000, and stated that if she did so, she would make a profit, and that it would be absolutely sure that she would not lose her money, and that the loan would be for only between thirty and sixty days; that Isaac told plaintiff the nature of it, and that these men wanted to buy up the stock and sell it; that Cook was vice president of the Central Trust Company, and a very substantial and worthwhile man of Chicago, and in all probability would be the next president of the bank; that Cook was also a director of the Testiphone-Mulliken Company, and that it was like that taking care of the stock, there was no way for plaintiff to lose a penny; that it was president of the Testiphone-Mulliken Company, Angsten was president of the Jersey Steel Company and Isaac had dealt in stocks and made lots of money, and at one time was president of a New York City bank; that Isaac stated to plaintiff that he had over 80,000 worth of Gold notes in the Testiphone-Mulliken Company, and that they were then trying to reorganize the company, and that the purpose in buying the stock. This witness testified to the effect that Isaac suggested that the stock be transferred to the name of the witness. On cross-examination, this witness stated that in the New York conversation between plaintiff and Isaac, Isaac stated, in effect, that he represented the syndicate, and desired to borrow money

to help the syndicate buy the Pettibone-Mulliken stock.

As a witness for himself, Cook testified to the effect that he had never directed anyone to borrow money for him in connection with the transactions referred to by plaintiff; that when plaintiff called upon the witness, she stated to him: "I am Mrs. Dudley, and here is my check for \$40,000. I have bought 4,000 shares of the Pettibone-Mulliken stock", and that thereupon he took the check and delivered the stock to her; that there never was any syndicate of any kind organized, that he was not treasurer of such syndicate, and that there never was any such meeting as that testified about. He testified that Isaacs came to the witness and said he desired to accumulate some shares of the Pettibone-Mulliken Company stock because they were going to have a consolidation of the Corey Steel Company and the Morden Frog Company, and that he, Isaacs, believed it would be a very good investment, and that he, the witness, said to Isaacs that he did not care to buy \$60,000 worth of stock at that time.

From the whole record, we conclude that the jury should have been permitted to pass upon the issues of fact presented by the pleading and evidence, not only as to The Cook Corporation, but as to the disputed testimony regarding William O. Cook's alleged participation in the transaction. The judgment is, therefore, reversed and the cause remanded for a retrial,

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

to help the syndicate buy the Pettibone-Mulliken stock.

As a witness for himself, Cook testified to the effect that

he had never directed anyone to borrow money for him in connection with the transactions referred to by plaintiff; that when plaintiff called upon the witness, she stated to him: "I am Mrs. Coffey, and

here is my check for \$40,000. I have bought 4,000 shares of the Pettibone-Mulliken stock", and that thereupon he took the check and

delivered the stock to her; that there never was any syndicate of any kind organized, that he was not treasurer of such syndicate, and

that there never was any such meeting as that testified about. He

testified that Isaac came to the witness and said he desired to

accumulate some shares of the Pettibone-Mulliken Company stock because

they were going to have a consolidation of the Coffey Steel Company

and the Morden Iron Company, and that he, Isaac, believed it would be

a very good investment, and that he, the witness, said to Isaac that

he did not care to buy 20,000 worth of stock at that time.

From the whole record, to conclude that the jury should have

been permitted to pass upon the issues of fact presented by the plead-

ing and evidence, not only as to the Cook Corporation, but as to the

disputed testimony regarding William S. Cook's alleged participation

in the transaction. The judgment is, therefore, reversed and the cause

remanded for a retrial.

REVEREND AND HONORABLE

DENIS E. SULLIVAN, J. J. AND JAMES J. CONWAY.

39138

FRANK DeCICCO, Administrator of the
Estate of Raymond DeCicco, Deceased,

Appellee.

v.

JOSEPH VODRAZKA,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

291 I.A. 612

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County for the sum of \$6,000.00, against the defendant. The action is predicated upon a charge that the defendant, in violation of an ordinance of the city of Chicago, sold to plaintiffs' intestate, a minor under the age of 18 years, a box of cartridges, and that another minor fired one of these cartridges from a rifle, and that thereby plaintiff's intestate met his death. The record indicates that the plaintiff's intestate was the person who purchased the cartridges in question, and that a boy named Bernard J. Talty loaded a small rifle with one of the cartridges and fired the shot which resulted in the death of DeCicco. Trial was by the court without a jury, and after hearing evidence, the court found for plaintiff, and upon its finding, the judgment appealed from was entered.

Bernard J. Talty testified, in substance, that he was 12 years of age; that he and Raymond DeCicco, on the night before the accident in question, went to the hardware store of the defendant, and that the witness told a man who waited upon him that he desired to purchase a box of 22 short cartridges; that he had bought bullets at this store prior to that time, and from the defendant; that the witness took the cartridges to his home, and at about 9 or 9:30 the next morning, he and DeCicco took the gun and went over to a junk yard and engaged in shooting at bottles and tin cans; that the witness was aiming at a bottle, or a big piece of tin, and that Raymond DeCicco came right up from under the gun about five feet away

STATE OF ILLINOIS, Administrator of the
Estate of Raymond DeGroot, Deceased,

Appellee,

v.

JOSEPH VANDERKAM,

Appellant.

2012 I.A. 612

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of

Cook County for the sum of \$100,000, against the defendant. The

action is predicated upon a charge that the defendant, in violation

of an ordinance of the city of Chicago, sold to plaintiff's interest

a minor under the age of 18 years, a box of cartridges, and that

another minor fired one of these cartridges from a rifle, and that

thereby plaintiff's interest lost his death. The record indicates

that the plaintiff's interest lost the person who purchased the

cartridges in question, and that a boy named Bernard J. Kelly loaded

a small rifle with one of the cartridges and fired the shot which

resulted in the death of DeGroot. Trial was by the court without a

jury, and after hearing evidence, the court found for plaintiff, and

upon its finding, the judgment entered from was entered.

Bernard J. Kelly testified, in substance, that he was 18

years of age; that he and Raymond DeGroot, on the night before the

accident in question, went to the hardware store of the defendant,

and that the witness told a man who called upon him that he desired

to purchase a box of 32 short cartridges; that he had bought bullets

at this store prior to that time, and from the defendant; that the

witness took the cartridges to his home, and at about 9 or 9:30 the

next morning, he and DeGroot took the gun and went over to a tank

yard and engaged in shooting at bottles and tin cans; that the

witness was aiming at a bottle, or a tin piece of tin, and that

Raymond DeGroot came right up from under the gun about five feet away

from it just as the witness pulled the trigger, and that Raymond fell; that the bullets which he purchased were the same as those which he had bought from the defendant before. On cross-examination, this witness testified that the gun with which the shooting was done, belonged to him, and that he bought it from some of the boys in the neighborhood and paid 25¢ for it. He described the man who sold the bullets as being about 30 or 31 years of age, that he wore glasses, had dark hair, wore a black suit, and was of medium height; that there were a group of men in the store at the time he purchased the bullets. He further stated that prior to the time Raymond was struck by the bullet, that he, Raymond had shot a number of times at tin cans and bottles. When asked how the accident happened, this witness testified that he put a bottle about four feet away on a piece of tin and was aiming at it; that he did not see Raymond, and that just as he pulled the trigger, Raymond came up in front of him about four feet away, that Raymond was deaf.

A police officer named Duffy testified that he was called immediately after the occurrence related by the former witness; that they rushed the boy to St. Anthony's Hospital, and that the boy was dead; that they took the Talty boy to the station.

Defendant testified to the effect that he kept a sporting goods and stationery store at 3359 West 26th Street, Chicago; that he did not keep a hardware store and that he had never seen the Talty boy; that he never sold him any cartridges at any time, nor had he sold cartridges to any boys who were minors; that the first time he heard of the case, two men came into his store with a boy, and asked the boy whether or not defendant was the man who sold the bullets to him, and that the boy said, "No". The same question was then asked about defendant's clerk, and the boy said, "No". In describing his clerk, the witness stated that he was a man about 38 or 40 years old, that he does not wear glasses and never has;

from it just as the witness pulled the trigger, and that Raymond fell; that the bullets which he purchased were the same as those which he had bought from the defendant before. On cross-examination, this witness testified that the gun with which the shooting was done, belonged to him, and that he bought it from some of the boys in the neighborhood and paid \$25 for it. He described the man who sold the bullets as being about 30 or 31 years of age, that he wore glasses, had dark hair, wore a black suit, and was of medium height; that there were a group of men in the store at the time he purchased the bullets. He further stated that prior to the time Raymond was struck by the bullet, that he, Raymond had shot a number of times at tin cans and bottles. When asked how the incident happened, this witness testified that he put a bottle about four feet away on a piece of tin and was aiming at it; that he did not see Raymond, and that just as he pulled the trigger, Raymond came on in front of him about four feet away, that Raymond was dead.

A police officer named Duffy testified that he was called immediately after the occurrence related by the former witness; that they rushed the boy to St. Anthony's Hospital, and that the boy was dead; that they took the little boy to the station.

Defendant testified to the effect that he kept a sporting goods and stationary store at 3538 West 8th Street, Chicago; that he did not keep a hardware store and that he had never sold the little boy; that he never sold him any cartridges at any time, nor had he sold cartridges to any boys who were around; that the first time he heard of the case, two men came into his store with a boy, and asked the boy whether or not defendant was the man who sold the bullets to him, and that the boy said, "No". The same question was then asked about defendant's clerk, and the boy said, "No". In describing his clerk, the witness stated that he was a man about 35 or 40 years old, that he does not wear glasses and never has;

that he, the witness, had no person working in the store who was about 30 years of age who had dark hair and who was stout and wore glasses that he knew no one of that description. This witness stated that he had not sold cartridges to any boy.

The ordinance of the City of Chicago, which it is claimed defendant violated, and upon which plaintiff's action is predicated, Sections 4001 and 4002, Chapter 111, of the Chicago Code, are as follows:

"Section 4001. Sale of explosives of any kind to minors prohibited - Penalty. It is hereby declared to be unlawful for any person, firm or corporation to sell, deliver or give to any minor under eighteen years of age any black powder, dynamite, nitro-glycerine, gun cotton or other dangerous explosive.

Section 4002. Penalty. Any person, firm or corporation violating any of the provisions of this chapter, or neglecting or refusing to comply with any of the requirements thereof, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense except where otherwise provided; and a separate and distinct offense shall be considered as having been committed for each and every day any person, firm or corporation shall violate any of the said provisions of this chapter."

In Hartnett v. The Boston Store, 265 Ill. 331, it was charged that the defendants, by its servants, had negligently and carelessly, and in disobedience of an ordinance of the City of Chicago, sold to a minor of the age of 15 years, a gun in which explosive substances could be used, together with certain cartridges to be used in the gun; that the gun was caused to be loaded with cartridges, and a leaden bullet was discharged from the gun, by reason of the negligence of the defendant in selling the gun, and that thereby the plaintiff was injured. There, as here, the action was predicated entirely upon a violation of an ordinance of the City of Chicago, which prohibits the sale of fire arms to any minor. There, as here, the plaintiff was injured by a minor who was firing a rifle at a target. Also, there, as here, the question was raised as to whether or not the sale of the rifle to a minor was the proximate cause of the injury. In that case, the court directed a verdict for the defendant, and in affirming the judgment, the Supreme Court said:

that he, the witness, had no person working in the store who was about 30 years of age who had dark hair and who was stout and wore glasses that he knew no one of that description. This witness stated that he had not sold cartridges to any boy.

The ordinance of the City of Chicago, which is in violation of defendant's ordinance, and upon which plaintiff's action is predicated, Sections 4001 and 4002, Chapter III, of the Chicago Code, are as follows:

"Section 4001. Sale of explosives of any kind to minors prohibited - Penalty. It is hereby enacted to be unlawful for any person, firm or corporation to sell, deliver or give to any minor under sixteen years of age any black powder, dynamite, nitro-glycerine, gunpowder or other explosive substance. Section 4002. Penalty. Any person, firm or corporation violating any of the provisions of this ordinance, or neglecting or refusing to comply with any of the provisions thereof, shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense except where otherwise provided; and a separate and distinct offense shall be considered as having been committed for each and every day any person, firm or corporation shall violate any of the said provisions of this chapter."

In Hartman v. The City of Chicago, 200 Ill. 511, 512, it was charged

that the defendant, by its servants, had negligently and carelessly, and in disobedience of an ordinance of the City of Chicago, sold to a minor of the age of 15 years, a gun in which explosive substances could be used, together with certain cartridges to be used in the gun; that the gun was caused to be loaded with cartridges, and a loaded bullet was discharged from the gun, by reason of the negligence of the defendant in selling the gun, and that thereby the plaintiff was injured. There, as here, the action was predicated entirely upon a violation of an ordinance of the City of Chicago, which prohibits the sale of fire arms to any minor. There, as here, the plaintiff was injured by a minor who was firing a rifle at a target. Also, there, as here, the question was raised as to whether or not the sale of the rifle to a minor was the proximate cause of the injury. In that case, the court directed a verdict for the defendant, and in affirming the judgment, the Supreme Court said:

"There are three essential elements in actionable negligence; First, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty, and third, a consequent injury so connected with the failure to perform the duty that the failure is the proximate cause of the injury. What constitutes proximate cause has been defined in numerous decisions, and there is practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act. If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. (Cooley on Torts, - 8d ed. - 99; Chicago Hair & Bristle Co. v. Mueller, 203 Ill. 558; Seith v. Commonwealth Electric Co., 241 id. 252.)"

In view of the holding of the Supreme Court in the case just cited, and of the fact that the record fails to show by a

preponderance of the evidence that the defendant was responsible for the death of plaintiff's intestate, we are constrained to hold that the court was in error in finding for the plaintiff. The judgment is, therefore, reversed and the cause remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

There are three general elements in action due to negligence; first, a duty imposed by law to exercise care in favor of the person for whose benefit the duty is imposed; second, the failure to perform that duty, and third, a consequent injury to or neglect with the failure to perform the duty, but the failure is the proximate cause of the injury. The proximate cause of the injury has been defined in numerous technical and legal cases, practically no difference of opinion as to what the rule is. The injury must be the natural and probable result of the negligent act or omission and be of such a character as an ordinarily prudent person would to have foreseen and properly guard against the negligence, though it is not essential that the person on trial with negligence should have taken the precise injury which might result from his act. If the negligence does nothing more than furnish a condition of which the injury is the result, and that condition causes an injury by the independent act of a third person, the action of the condition is not the proximate cause of the injury. (Coley v. Cole, 23 Cal. 2d - 33; Chicago & North Western Ry. Co. v. Heller, 203 Ill. 535; Smith v. Co. on the electric Co. 101 Ill. 127.)

39157

WILLIAM MAHER, et al.,
Plaintiffs and Counter Defendants below,

Appellees,

v.

LEONARD W. ENGELS, Executor of the Estate
of CHARLES ERLMANN, Deceased, Defendants
and Counter Claimants,

On Appeal of LEONARD W. ENGELS, Executor of
the Estate of CHARLES ERLMANN, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

291 I.A. 612²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On May 1, 1920, William Maher and Johanna Maher, husband and wife, executed a promissory note, payable to bearer, for the sum of \$2,200.00, and conveyed certain real estate by trust deed to George W. Torpe, as trustee, to secure the payment of the note. Payments were made on the principal of the note aggregating \$400.00, together with interest, and on May 1, 1923, the date of its maturity, by agreement, the note was extended to May 1, 1926, and on May 1, 1926, by proper agreement, the time for the payment of the note was extended to May 1, 1929. The note evidenced a loan to the Mahers, which was made through Torpe, a real estate and loan agent. Shortly prior to May 29, 1928, Maher and his wife applied to Torpe, - as their agent, as William Maher testified, - for an additional loan, and the record indicates that Torpe told them that he would communicate with the owner of the note and trust deed, and ascertain whether or not an additional loan would be made, and that the owner then agreed to furnish an additional \$500.00, and to increase the loan to \$2,300.00. Thereafter, on May 29, 1928, Torpe and his wife executed a new note for the sum of \$2,300.00, with interest notes attached thereto, together with a new trust deed conveying to the same trustee, the same property as was conveyed by the original trust deed. Thereupon, Lena Fingerhuth, the owner of the original trust deed, delivered to Torpe the original trust deed, together with the principal note

WILLIAM WABER, et al.,
Plaintiffs and Counter Defendants Below,

vs.

LEONARD W. ENGLISH, Executor of the Estate
of CHARLES ERLANDA, Deceased, Defendants
and Counter Claimants,

On appeal of LEONARD W. ENGLISH, Executor of
the Estate of CHARLES ERLANDA, Deceased,

Defendant.

3011 A. 612

CLERK COURT
COOK COUNTY.

THE JUSTICE HALL, CITY OF CHICAGO, ILLINOIS.

On May 1, 1930, William Waber and Leonard Waber, husband and wife, executed a promissory note, payable to bearer, for the sum of \$2,300.00, and conveyed certain real estate by trust deed to George W. Torpe, as trustee, to secure the payment of the note. Payments were made on the principal of the note aggregating \$400.00, together with interest, and on May 1, 1933, the date of its maturity, by agreement, the note was extended to May 1, 1937, and on May 1, 1938, by proper agreement, the time for the payment of the note was extended to May 1, 1938. The note evidenced a loan to the Wabers, which was made through Torpe, a real estate and loan agent. Shortly prior to May 29, 1938, Waber and his wife applied to Torpe, as their agent, as William Waber testified, - for an additional loan, and the record indicates that Torpe told them that he would communicate with the owner of the note and trust deed, and ascertain whether or not an additional loan would be made, and that the owner then agreed to furnish an additional \$600.00, and to increase the loan to \$2,900.00. Thereafter, on May 29, 1938, Torpe and his wife executed a new note for the sum of \$2,900.00, with interest notes attached thereto, together with a new trust deed conveying to the same trustee, the same property as was conveyed by the original trust deed. Thereupon, Lena Ringbuth, the owner of the original trust deed, delivered to Torpe the original trust deed, together with the principal note

which the deed was given to secure, which indicated a balance due of \$1,800.00. Torpe delivered to Lena Fingerhuth the new note for \$2,300.00, together with the new trust deed given to secure the same. Torpe then paid to Maher and his wife, on behalf of Lena Fingerhuth, the additional \$500.00, and the Mahers paid interest regularly to Lena Fingerhuth on the new note. Both the original trust deed and the second trust deed were recorded in the office of Recorder of Deeds of Cook County shortly after their execution. As stated, Torpe was the trustee in the original trust deed and in the subsequent trust deed. William Maher testified that Torpe agreed with him to cancel the old trust deed. However, instead of releasing this original trust deed, Torpe at about the time he took the new trust deed, sold the old note and the trust deed given to secure it, to one Charles Erlmann, who is now deceased. Defendant, Leonard W. Engels, is the executor of his estate. Torpe continued to pay interest on the original note to Erlmann during Erlmann's life, and subsequently to Engels. As trustee, Torpe has never executed a release of the original trust deed, and has absconded.

On May 31, 1934, William and Johanna Maher filed a bill in the Circuit Court of Cook County, in which they set forth the matters hereinbefore referred to, and allege that in February, 1934, they first learned that Torpe had not executed and recorded a release of the original trust deed; that Erlmann is deceased and that Engels had been appointed and was acting as executor of the Erlmann estate; that the original note and trust deed given to secure it, no longer constitute evidence of indebtedness, nor a lien on the real estate involved, because of the fact that it was paid and discharged. They allege that notwithstanding the above, Engels, as executor of the estate of Charles Erlmann, still claims that the principal note constitutes evidence of valid indebtedness, and that the trust deed given to secure the same, is a valid lien on the premises, and that the

which the deed was given to secure, which indicated a balance due of \$1,800.00. Torpe delivered to Lena Ringenruth the new note for \$2,300.00, together with the new trust deed given to secure the same. Torpe then paid to her and his wife, on behalf of Lena Ringenruth, the additional \$500.00, and the others paid interest regularly to Lena Ringenruth on the new note. Both the original trust deed and the second trust deed were recorded in the office of recorder of Deeds of Cook County shortly after their execution. As stated, Torpe was the trustee in the original trust deed and in the subsequent trust deed. William later testified that Torpe agreed with him to cancel the old trust deed. However, instead of releasing this original trust deed, Torpe at about the time he took the new trust deed, sold the old note and the trust deed given to secure it, to one Charles Wilmann, who is now deceased. Defendant, Leonard A. Engels, is the executor of his estate. Torpe continued to pay interest on the original note to Wilmann during Wilmann's life, and subsequently to Engels. As trustee, Torpe has never executed a release of the original trust deed, and has absconded.

On May 21, 1934, William and Johanna later filed a bill in the Circuit Court of Cook County, in which they set forth the matters hereinbefore referred to, and filed that in February, 1934, they first learned that Torpe had not executed and recorded a release of the original trust deed; that Wilmann is deceased and that Engels had been appointed and was acting as executor of the Wilmann estate; that the original note and trust deed given to secure it, no longer constituted evidence of indebtedness, nor a lien on the real estate involved, because of the fact that it was sold and discharged. They allege that notwithstanding the above, Engels, as executor of the estate of Charles Wilmann, still claims that the principal note constitutes evidence of valid indebtedness, and that the trust deed given to secure the same, as a valid lien on the premises, and that the

record of the original trust deed is a cloud upon the title of the real estate. The prayer of the bill is that George W. Torpe, or his successor in trust, be ordered to release the lien of the original trust deed, and that in the event of failure in that regard, that the court appoint a Master in Chancery, or successor trustee, to execute such release deed. To this petition, Engel, as executor, filed an answer and counterclaim, in which he admits all the salient facts hereinbefore referred to, but denies that the record of the original trust deed is a cloud upon the title of plaintiffs and claims that his lien is superior to that of Lena Fingerhuth; alleges that the mortgaged premises are scant and meager security for the amount of principal and interest due and owing on the note owned by him, as executor; alleges that Maher and his wife are insolvent, that the premises are in a poor state of repair, and seeks foreclosure of his trust deed, and prays that a receiver be appointed pendente lite for the premises involved. Lena Fingerhuth was not a party to the original petition, but was made a party to the cross petition of Engels, and then entered her appearance. On February 29th, 1935, Lena Fingerhuth filed an answer and counterclaim, in which she restates the facts already set forth, and claims that the lien of the second trust deed is superior to the first, prays that the original trust deed may be found to be fully paid and discharged and of no further force and effect, that Engels, as executor of the estate of Erlmann, may be ordered to deliver up the same, together with all extensions and interest coupons attached thereto, and that both the original note and trust deed be cancelled. In the alternative, she prays that the second of the two trust deeds be declared to be a prior lien on the premises.

The court referred the cause to a Master in Chancery to make a report on the facts and the law. The Master made a report, and after hearing objections and exceptions thereto, the court found

record of the original trust deed is a cloud upon the title of the real estate. The prayer of the bill is that the court should order his successor in trust, be ordered to release the lien of the original trust deed, and that in the event of failure in the registry, that the court appoint a master in chancery, or successor trustee, to execute such release deed. To this petition, Daniel, as executor, filed an answer and counterclaim, in which he denies all the allegations hereinbefore referred to, but denies that the record of the original trust deed is a cloud upon the title of plaintiffs and claims that his lien is superior to that of Jones Lingerhuth; alleges that the mortgaged premises are sold and superior security for the amount of principal and interest due and owing on the note owned by him, as executor; alleges that neither he nor his estate are insolvent, that the premises are in a poor state of repair, and seeks foreclosure of his trust deed, and prays that a receiver be appointed pendente lite for the premises involved. Jones Lingerhuth was not a party to the original petition, but was made a party to the cross petition of Daniel, and then entered her appearance. On February 28th, 1935, Daniel Lingerhuth filed a reply and counterclaim, in which she restates the facts already set forth, and claims that the lien of the second trust deed is superior to the first, prays that the original trust deed may be found to be fully paid and discharged and of no further force and effect, that Daniel, as executor of the estate of William, may be ordered to deliver up the same, together with all extensions and interest coupons attached thereto, and that both the original note and trust deed be cancelled. In the alternative, she prays that the second of the two trust deeds be declared to be a junior lien on the premises.

The court referred the case to a master in chancery to make a report on the facts and the law. The master made a report, and after hearing objections and exceptions thereto, the court found

the facts as to the transactions between the parties, to be substantially as above set forth, and made a further finding to the effect that Lena Fingerhuth is the owner and holder of the new trust deed and the principal note secured thereby, together with the unpaid interest coupons attached thereto; that Engels, as executor of the estate of Erlmann, is the owner and holder of the old trust deed and the note secured thereby; that Lena Fingerhuth was the owner and holder of the old trust deed from May 19, 1925, to May 29, 1928; that Erlmann acquired the old trust deed for a valuable consideration; that insofar as Lena Fingerhuth is concerned, the lien of the old trust deed was extinguished by the execution and delivery of the new trust deed, and had been so extinguished before the assignment and delivery of the old trust deed to Erlmann; that the lien of Engels, as executor, is junior and inferior to the right of Lena Fingerhuth in the real estate and that the negotiation of the old trust deed by Torpe was occasioned by the failure of Maher, complainant, to have the old trust deed cancelled. The court found that, by virtue of her ownership of the principal note in the sum of \$2,300.00, dated May 29, 1928, and of the trust deed securing the same, Lena Fingerhuth has a good and valid lien upon the real estate to secure the payment of the note secured thereby, and that the lien is prior and superior to any right, title or interest of any other party; that by virtue of his ownership of the note dated May 1, 1922, of William and Johanna Maher, upon which \$1,800.00 was due and unpaid, together with interest thereon, and of the trust deed given to secure the same, Engels, as executor of the estate of Erlmann, has a good and valid lien upon the real estate to secure the payment of the note and interest, subject, however, to the lien of Lena Fingerhuth.

Engels, as executor of the estate of Erlmann, appeals from the decree of the court, and insists that the decree should be

the facts as to the transactions between the parties, to be substantiated by evidence above set forth, and made a further finding to the effect that Lena Fingerhuth is the owner and holder of the new trust deed and the principal note secured thereby, together with the unpaid interest coupons attached thereto; that Angela, as executor of the estate of Erlmann, is the owner and holder of the old trust deed and the note secured thereby; that Lena Fingerhuth was the owner and holder of the old trust deed from May 13, 1933, to May 29, 1934; that Erlmann secured the old trust deed for a valuable consideration; that insofar as Lena Fingerhuth is concerned, the lien of the old trust deed was extinguished by the execution and delivery of the new trust deed, and had been so extinguished before the assignment and delivery of the old trust deed to Erlmann; that the lien of Angela, as executor, is junior and inferior to the right of Lena Fingerhuth in the real estate and that the negotiation of the old trust deed by Torpe was occasioned by the failure of Angela, complainant, to have the old trust deed cancelled. The court found that, by virtue of her ownership of the principal note in the sum of \$1,500.00, dated May 29, 1933, and of the trust deed securing the same, Lena Fingerhuth has a good and valid lien upon the real estate to secure the payment of the note secured thereby, and that the lien is prior and superior to any right, title or interest of any other party; that by virtue of his ownership of the note dated May 1, 1932, of \$1,000.00 and Erlmann's death, upon which \$1,000.00 was due and unpaid, together with interest thereon, and of the trust deed given to secure the same, Angela, as executor of the estate of Erlmann, has a good and valid lien upon the real estate to secure the payment of the note and interest, subject, however, to the lien of Lena Fingerhuth. Angela, as executor of the estate of Erlmann, appeals from the decree of the court, and insists that the decree should be

reversed because "the purchaser of a trust deed or mortgage takes it free of the equities of third parties of which he had no notice, either actual or constructive, and that because Lena Fingerhuth had clothed Torpe with the indicia of the old trust deed and of the notes secured thereby, she is estopped to deny such ownership, or that the trust deed and note were what they purported to be, that is to say, a valid first lien on the land for the sum of \$1,800.00 due and payable on the old note.

The Mahers, as cross-appellants, assert that in view of the fact that the record indicates that the same firm of attorneys in the hearing before the court and Master, represented the Mahers and Lena Fingerhuth, and drafted the decree from which the appeal is taken, that the decree should be reversed.

We are of the opinion that the holding that Lena Fingerhuth has a valid prior lien upon the premises to secure the payment of her principal note, is correct, and that in holding that Engels, as executor, has a second, or subsequent, lien, the court was also correct. The record shows, beyond any question, that Torpe was acting as agent for the Mahers in the transaction, and that Lena Fingerhuth cannot be held responsible for Erlmann's neglect in failing to ascertain all the facts in the case when he purchased the note and trust deed from Torpe.

The decree of the Circuit Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

reversed because "the purchase of a trust deed or mortgage takes it free of the equities of third parties of which he had no notice, either actual or constructive, and that because Lane-Fingerhuth was clothed with the indicia of the old trust deed and of the notes secured thereby, she is estopped to deny such ownership, or that the first deed and note were what they purported to be, that is to say, a valid first lien on the land for the sum of \$1,200.00 due and payable on the old note.

The Appellate, as cross-appellants, assert that in view of the fact that the record indicates that the same firm of attorneys in the hearing before the court and Master, represented the Appellants and Lane-Fingerhuth, and drafted the decree from which the appeal is taken, that the decree should be reversed.

We are of the opinion that the holding that Lane-Fingerhuth has a valid prior lien upon the premises to secure the payment of her principal note, is correct, and that in holding that Appellants, as executor, has a second, or subsequent, lien, the court was also correct. The record shows, beyond any question, that Torpe was acting as agent for the Appellants in the transaction, and that Lane-Fingerhuth cannot be held responsible for Appellants' failure to ascertain all the facts in the case when he purchased the note and trust deed from Torpe.

The decree of the Circuit Court is affirmed.

WITNESSED.

DENIS E. SULLIVAN, J. J. AND KIMM, J. CONCUR.

38955

ALFRED M. BEST COMPANY, INC., a
Corporation,

Appellee,

v.

INDEX PUBLISHING COMPANY, a Corporation,
JAMES E. DUNNE, CHARLES D. DUNNE and
EBER E. LUSK,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

291 I.A. 612³

ON REHEARING

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Upon defendants' petition for a rehearing, which was allowed by the court, we again consider the question whether the trial court abused its discretion in refusing to set aside defendants' default for failure to appear and erred in failing to permit the defendants to file their several pleas of defense.

The record in this case shows that service of summons was had on the defendants Index Publishing Company, a corporation, Charles D. Dunne and Eber E. Lusk, on September 5, 1935, and on James E. Dunne on September 30, 1935; that an appearance by Frank X. Brickley, as attorney for the Index Publishing Company and Charles D. Dunne, defendants, was filed on October 4, 1935, and that no appearance by defendant James E. Dunne was filed at any time. On October 29, 1935, this defendant filed a motion supported by an affidavit, to set aside his default and for leave to appear and defend. Thereafter, on November 12, 1935, the trial court denied this motion.

On this question it is necessary to consider the Civil Practice Act, Ch. 110, Par. 223, Sec. 95, Cahill's Ill. Rev. Stats. 1933, wherein it is provided that the return days shall be the first and third Mondays in each calendar month. The time of service is provided for in paragraph 227, Sec. 99, Rule 5, sub-division (2), as follows:

ALLIED W. BEST COMPANY, INC.,
 Corporation,
 Appellee,
 v.
 INDEX FURNISHING COMPANY, A Corporation,
 JAMES E. DUNNE, CHARLES D. DUNNE and
 BILLY E. DUNNE,
 Appellants.

39355

ON REHEARING

MR. JUSTICE HARLAN delivered the opinion of the court.

Upon defendants' petition for a rehearing, which was
 allowed by the court, we again consider the question whether the
 trial court abused its discretion in refusing to set aside defendants'
 default for failure to appear and tried in failing to permit the
 defendants to file their several pleas of defense.

The record in this case shows that service of summons was
 had on the defendants Index Furnishing Company, a corporation,
 Charles D. Dunne and Billy E. Dunne, on September 3, 1935, and on
 James E. Dunne on September 30, 1935; that an appearance by Frank
 A. Brickley, an attorney for the Index Furnishing Company and Charles
 D. Dunne, defendants, was filed on October 4, 1935, and that no
 appearance by defendant James E. Dunne was filed at any time. On
 October 20, 1935, this defendant filed a motion supported by an
 affidavit, to set aside his default and for leave to appear and
 defend. Thereafter, on November 12, 1935, the trial court denied
 this motion.

On this question it is necessary to consider the Civil
 Practice Act, Ch. 110, pars. 223, Sec. 95, Cahill's Ill. Rev. Stat.
 1933, wherein it is provided that the return days shall be the first
 and third Mondays in each calendar month. The time of service is
 provided for in paragraph 27, Sec. 93, rule 2, sub-division (2),
 as follows:

"The defendant shall appear on or before the first return day named in the summons provided the summons shall be served upon him not less than 20 days prior to said return day, and in case said summons shall be served upon him less than 20 days before said return day, the defendant shall appear on or before the next return day."

Provision for default for want of an appearance or for failure to plead, appears in paragraph 178, Sec. 50, sub-division (6) as follows:

"Judgment by default or a decree pro confesso may be entered for want of an appearance, or for failure to plead, but the court may in either case, require the plaintiff to prove the allegations of his complaint."

And sub-division (7) of this same paragraph provides for the setting aside of a default in these words:

"The court may in its discretion before final judgment, set aside any default, and may within thirty days after entry thereof, set aside any judgment or decree upon good cause shown by affidavit upon such terms and conditions as shall be reasonable."

Rule 11 of the Circuit and Superior Courts of Cook County, Section 1, provides:

"Appearance and Default. Where process has been duly served to a given return day, the defendant shall appear before the opening of court on Wednesday, the second day after such return day. In the event of his failure so to appear by filing a motion or pleading, he shall be considered in default."

Then follows the procedure provided for by Rule 11, Section 6, which is as follows:

"No order of default, judgment by default or (subject to the provisions of Section 50 (8) of the Civil Practices Act) decree by default shall be set aside except upon affidavit of the defendant or of some person for him setting forth facts going to show:

(a) That the defendant has a meritorious defense to the action or to some substantial part of the plaintiff's demand, and

(b) That the failure to appear or otherwise proceed which has occasioned the default has not been due to any lack of diligence on the part of himself or his attorney or solicitor."

The defendant James E. Dunne relies largely on the fact that the attorney whom he retained failed to appear and file his appearance and plead for him, or the co-defendants, and states in his affidavit that

"The defendant shall appear on or before the first return day named in the summons provided the summons shall be served upon him not less than 30 days prior to said return day, and in case it shall be served upon him less than 30 days before said return day, the defendant shall appear on or before the next return day."

Provision for default for want of an appearance or for failure to plead, appears in paragraph 178, Sec. 50, sub-division (6) as follows:

"Judgment by default or a decree pro confesso may be entered for want of an appearance, or for failure to plead, but the court may in either case, require the plaintiff to prove the allegations of his complaint."

And sub-division (7) of this same paragraph provides for the setting aside of a default in these words:

"The court may in its discretion before final judgment set aside any default, and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit upon such terms and conditions as shall be reasonable."

Rule 11 of the Circuit and Superior Courts of Cook County,

Section 1, provides:

"Appearance and default. Where process has been duly served to a given return day, the defendant shall appear before the opening of court on Wednesday, the second day after such return day. In the event of his failure so to appear by filing a motion or pleading, he shall be considered in default."

Then follow the procedure provided for by Rule 11,

Section 6, which is as follows:

"No order of default, judgment by default or (subject to the provisions of Section 50 (6) of the Civil Practice Act) decree by default shall be set aside except upon affidavit of the defendant or of some person for his setting forth facts going to show:

(a) That the defendant has a meritorious defense to the action or to some substantial part of the plaintiff's demand; and

(b) That the failure to appear or otherwise proceed which has occasioned the default has not been due to any lack of diligence on the part of himself or his attorney or solicitor."

The defendant James E. Dunne relies largely on the fact that the attorney whom he retained failed to appear and file his appearance and plead for him, or the co-defendants, and states in his affidavit

that

" * * * he retained one Francis X. Brickley, an attorney duly licensed to practice in the State of Illinois, to represent this affiant and all of the other parties named as defendants in this cause; and the said Francis X. Brickley advised this affiant that he would forthwith file appearances and answers for all of the said defendants named in this cause.

Affiant further represents unto the court that on October 26, 1935, knowledge came to this affiant that the said Francis X. Brickley had failed to file the appearance of all the defendants and had failed to file the appearance of this affiant, and further that the said Francis X. Brickley had failed to file answers for any of the said defendants; and further that the said Francis X. Brickley had withdrawn his appearance as attorney for the Index Publishing Company, a corporation."

From the filed affidavit it appears that there was lack of diligence of the defendants necessary to satisfy the trial court that the default should be set aside and the defendants permitted to offer their pleas of defense. The fact that the attorney for the defendants was negligent would bar the right to have the default set aside, unless the defendants showed by a statement of fact that they exercised due diligence to protect their rights, and that they had a meritorious defense. We again refer to the cases cited in our opinion, namely: Schroer, et al v. Wessell, 89 Ill. 113; Thelmann, et al v. Burg, 73 Ill. 294; and in addition, Whalen v. Twin City Barge & Gravel Co., 280 Ill. App. 596.

The defense set forth in the affidavit filed is largely based upon the suggestion that the libelous article, the subject of this litigation, was not against the plaintiff, but rather against the individual Alfred M. Best, one of the officers of the corporation.

As we have indicated in the opinion heretofore filed, we believe the allegations contained in the complaint are sufficient to support the judgment entered in this cause.

Having considered what we believe to be the pertinent questions brought to our attention on the petition for a rehearing, we adhere to the opinion heretofore filed in this cause, and the judgment is again affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

" * * * he retained one Francis X. Brickley, an attorney duly licensed to practice in the State of Illinois, to represent this affiant and all of the other parties named as defendants in this cause; and the said Francis X. Brickley advised this affiant that he would forthwith file proper papers and answers for all of the said defendants named in this cause.

Affiant further represents unto the court that on October 28, 1936, knowledge came to this affiant that the said Francis X. Brickley had failed to file the appearance of all the defendants and had failed to file the answers of this affiant, and further that the said Francis X. Brickley had failed to file answers for any of the said defendants; and further that the said Francis X. Brickley had withdrawn his appearance as attorney for the Index Publishing Company, a corporation."

From the filed affidavit it appears that there was lack of diligence of the defendants necessary to satisfy the trial court that the default should be set aside and the defendants permitted to offer their pleas of defense. The fact that the attorney for the defendants was negligent would not be the right to have the default set aside, unless the defendants showed by a statement of fact that they exercised due diligence to protect their rights, and that they had a meritorious defense. He again refers to the cases cited in our opinion, namely: Conner et al v. Kessell, 28 Ill. 112; Thelmann et al v. Kessell, 73 Ill. 324; and in addition, Wheeler v. Twin City Horse & Carriage Co., 280 Ill. App. 326.

The defense set forth in the affidavit filed is largely based upon the allegation that the libelous article, the subject of this litigation, was not against the plaintiff, but rather against the individual Alfred W. Kent, one of the officers of the corporation. As we have indicated in the opinion heretofore filed, we believe the allegations contained in the complaint are sufficient to support the judgment entered in this cause.

Having considered what we believe to be the pertinent questions brought to our attention on the petition for a rehearing, we adhere to the opinion heretofore filed in this cause, and the judgment is again affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J. AND HALL, J. CONCUR.

39145

JOSEPHINE TWARDY,

Plaintiff - Appellee.

v.

GUY A. RICHARDSON, et al., etc.,

Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

291 I.A. 612⁴

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for \$10,000 entered by the court upon a verdict of the jury for the plaintiff in an action for damages for personal injuries alleged to have been suffered by her in falling upon the northbound street car track in Cottage Grove Avenue near 91st street, and in being struck by the front vestibule of a northbound street car operated by the defendants. No question was raised as to the pleadings, and the facts are, substantially, that at the place where the accident occurred Cottage Grove Avenue runs north and south and has a double street car track in it. A short time prior to the accident there was constructed by the City of Chicago a loading zone or safety island of concrete, east of the northbound track and south of 91st street. This island is about 65 feet long, 4-1/2 feet wide and 5-1/2 inches above the street pavement. There is a slope or ramp leading from the north end of the island to the south crosswalk on 91st street which is about 5 feet long. The space between the safety island and the east rail of the northbound track is from 1 to 2-1/2 feet, and was erected for the purpose of allowing the overhang on the street car, which is about 2 feet, to pass this loading zone. The distance between the safety island and the east curb in Cottage Grove avenue is 10 to 15 feet. There is what is called a blinker light at the south end of the safety island.

Plaintiff was 20 years of age at the time of the accident and was employed at the Standard Laundry at a wage of \$8.00 a week. She returned to work after four months absence. She had been accustomed to taking the street car at this particular corner every

JOSEPHINE TANDY,

Plaintiff - Appellee,

SUPERIOR COURT

COOK COUNTY,

GUY A. RICHARDSON, et al., etc.,

Defendants - Appellants.

S. I. A. 512

MR. JUSTICE HENRY C. WILSON, in the opinion of the court.

Defendants appeal from a judgment for \$10,000 entered by the court upon a verdict of the jury for the plaintiff in an action for damages for personal injuries alleged to have been suffered by her in falling upon the northbound street car track in Cottage Grove Avenue near 61st street, and in being struck by the front vestibule of a northbound street car operated by the defendants. No question was raised as to the pleadings, and the facts are, substantially, that at the place where the accident occurred Cottage Grove Avenue runs north and south and has a double street car track in it. A short time prior to the accident there was constructed by the City of Chicago a loading zone or safety island of concrete, east of the northbound track and south of 61st street. This island is about 35 feet long, 4-1/2 feet wide and 3-1/2 inches above the street pavement. There is a slope or ramp leading from the north end of the island to the south crosswalk at 61st street which is about 5 feet long. The space between the safety island and the east rail of the northbound track is from 1 to 2-1/2 feet, and was erected for the purpose of allowing the overhang on the street car, which is about 3 feet, to pass this loading zone. The distance between the safety island and the east curb in Cottage Grove Avenue is 10 to 15 feet. There is what is called a blinker light at the south end of the safety island. Plaintiff was 30 years of age at the time of the accident and was employed at the Standard Laundry at a wage of \$8.00 a week. She returned to work after four months absence. She had been accustomed to taking the street car at this particular corner every

morning for several years. On the morning of the accident, the weather was clear and cold. The streets were dry with some frost on them, but there was no snow on the ground. The plaintiff and her sister, who also worked at the same laundry, left their home and walked south to 91st street, then west to Cottage Grove avenue. They reached the southeast corner of the intersection shortly after 7 o'clock in the morning. On the curbing where the two streets meet at the southeast corner is a newspaper stand. Plaintiff's sister stopped to buy a newspaper and plaintiff continued toward the safety island.

Plaintiff testified that when her sister stopped to buy the newspaper, plaintiff looked to see if a street car was coming and saw a car coming about a half block away; that she walked slowly out to the loading zone; that she wore galoshes over her shoes, and that when she reached the loading zone she put her right foot up on it and then drew her left foot up but that she stumbled with her left foot or bumped it on the safety island and fell headlong across the safety island and the northbound track, striking her forehead on the west rail of the northbound track, and that she did not remember anything that happened after she fell.

Plaintiff testified, however, that when she reached the safety island and stumbled, the street car was about 20 feet south of the safety island and was moving at medium speed.

There were several persons standing on the safety island close to where plaintiff fell waiting to board the oncoming street car.

From the evidence it appears that there were no passengers on the front platform of the street car at the time, except the motor-man and the conductor.

Plaintiff's sister was single at the time of the accident but has been married since and is now named Stella Peurion. She testified:

morning for several years. On the morning of the accident, the weather was clear and cold. The streets were dry with some frost on them, but there was no snow on the ground. The Plaintiff and her sister, who also resided at the same family, left their home and walked south to 51st street, then west to Cottage Grove Avenue. They reached the southeast corner of the intersection shortly after 7 o'clock in the morning. On the curbing where the two streets meet at the southeast corner is a newspaper stand. Plaintiff's sister stopped to buy a newspaper and Plaintiff continued toward the safety island. Plaintiff testified that when her sister stopped to buy the newspaper, Plaintiff looked to see if a street car was coming and saw a car coming about a half block away; that she walked slowly out to the loading zone; that she wore rubbers over her shoes, and that when she reached the loading zone she put her right foot up on it and then drew her left foot up but that she stumbled with her left foot or bumped it on the safety island and fell headlong across the safety island and the northbound track, striking her forehead on the west rail of the northbound track, and that she did not remember anything that happened after she fell.

Plaintiff testified, however, that when she reached the safety island and stumbled, the street car was about 50 feet south of the safety island and was moving at medium speed.

There were several persons standing on the safety island close to where Plaintiff fell waiting to board the oncoming street car. From the evidence it appears that there were no passengers on the front platform of the street car at the time, except the motor-man and the conductor.

Plaintiff's sister was single at the time of the accident but has been married since and is now named Stella Pearson. The

testified:

"I stopped to get a newspaper at the stand and she went across to the safety island. When I turned around and looked, she was already on the tracks lying with her face toward the brick."

She stated she also saw that the street car had started from 92nd street, at which time the plaintiff was walking across the street to the safety island; that when she next saw her sister, the street car was over her sister's body. She also testified that her sister was walking slow and the car was approaching 91st street. She further testified that the only time she noticed her sister was when she slid off the safety island and fell on the track. She stated: "I saw her slide off the safety island, not feet first. I didn't see her stumble. I saw her slide on the safety island;" that when she slid forward to the west she let go of her purse and lunch, and she fell "like that with her hands right on the track," indicating.

It also appears from her testimony that at the time plaintiff fell over on the track the street car was about 20 feet south of the safety island; that it kept on going and stopped over plaintiff's body, and that when the street car came to a stop the front end of it was about four feet north of the safety island.

Defendants produced several witnesses to the occurrence. From the testimony of these witnesses, when plaintiff fell the street car was somewhere within 10 feet of her. Several of the witnesses testified that they saw the two girls running at a rapid speed to catch the car; that one of them tripped over the safety island and fell headlong on the northbound track.

The motorman who operated the car testified that when

"I stopped to get a newspaper at the stand and she went across to the safety island. Then I turned around and looked, she was already on the tracks lying with her face toward the track."

She stated she also saw that the street car had started from 82nd street, at which time the plaintiff was walking across the street to the safety island; that when she next saw her sister, the street car was over her sister's body. She also testified that her sister was walking slow and the car was approaching 81st street. That thereafter testified that the only time she noticed her sister was when she slid off the safety island and fell on the track. He testified: "I saw her slide off the safety island, not just first. I didn't see her tumble. I saw her slide on the safety island;" that when she slid forward to the west she let go of her purse and lunch, and she fell "like that with her hands right on the track," that is, eating.

It also appears from her testimony that at the time plaintiff fell over on the track the street car was about 20 feet south of the safety island; that it kept on going and stopped over plaintiff's body, and that when the street car came to a stop the front end of it was about four feet north of the safety island. Defendant produced several witnesses to the occurrence. From the testimony of these witnesses, when plaintiff fell the street car was somewhere within 10 feet of her. Several of the witnesses testified that they saw the two girls running at a rapid speed to catch the car; that one of them tripped over the safety island and fell her hand on the northbound track. The motorman who operated the car testified that when

he was about midway of the safety island he saw a young woman 3 or 4 feet from the safety island, running in a southwesterly direction; that when she reached the safety island she stumbled on the east side of it and came head first onto the street car track; that his car was about 7 or 8 feet away when she fell on the track; that when he saw her stumble he pushed his brake over in emergency and stopped the car, with its front end 4 or 5 feet south of the slope from the island to the crosswalk; that plaintiff was about a foot and a half under the front end of the car.

The conductor of this street car also testified that the car was what was called a front entrance car. His position was at the rear end of the front platform, facing east when the car is northbound. He testified that he saw this young woman before the accident; that she came running from the east, from the sidewalk toward the car. She was running a little to the southwest and as she got to the east side of the safety island she tripped and fell headlong across the track and that the front end of the car was 7 to 8 feet south of the girl when she tripped and 5 or 6 feet from her when she fell across the track, and that he could not see her after she fell on the track. The street car came to a stop about 4 feet from the slant down to the street. The girl was about 2 feet under the front end of the car. The car was equipped with safety regulations, that is, was equipped with fenders which would pick up a person who had fallen on the track. The fender or basket on this car was under the front vestibule about 3 feet back from the front of the car. There is an apron which hangs down just under the front of the car. When anything touches the apron it releases the basket or fender and it falls to the ground.

While there is no evidence of the exact clearance between the surface of the street or rail and the bottom of the vestibule, there is evidence that the floor of the vestibule is 20 or 22 inches

he was about midway of the safety island he saw a young woman 3 or 4 feet from the safety island, running in a southeasterly direction;

that when she reached the safety island she stumbled on the east

side of it and came head first onto the street car track; that

his car was about 7 or 8 feet away when she fell on the track; that

when he saw her tumble he pushed his brake over in earnest and

stopped the car, with its front end 4 or 5 feet south of the slope

from the island to the crosswalk; that plaintiff was about 4 feet

and a half under the front end of the car.

The conductor of this street car also testified that the

car was what was called a front entrance car. Its position was at the

rear end of the front platform, facing east when the car is northbound.

He testified that he saw this young woman before the accident; that

she came running from the east, from the sidewalk toward the car. She

was running a little to the southwest and as she got to the east side

of the safety island she tripped and fell headlong across the track

and that the front end of the car was 7 to 8 feet south of the girl

when she tripped and 5 or 6 feet from her when she fell across the

track, and that he could not see her after she fell on the track. The

street car came to a stop about 4 feet from the island down to the

street. The girl was about 3 feet under the front end of the car.

The car was equipped with safety regulations, that is, was equipped

with fenders which would pick up a person who had fallen on the track.

The fender or basket on this car was under the front vestibule about

3 feet back from the front of the car. There is an apron which hangs

down just under the front of the car. The apron touches the

apron it releases the basket or fender and it falls to the ground.

While there is no evidence of the exact clearance between

the surface of the street or rail and the bottom of the vestibule,

there is evidence that the floor of the vestibule is 30 or 32 inches

above the rail; that after the plaintiff was removed from under the front end of the car she was taken to the Burnside Hospital, where she was treated by Dr. Schussler, and received attention from those who were employed by the hospital for that purpose. The physician who attended the plaintiff at this time was not called as a witness. There was a witness, Dr. Saunders, who examined the plaintiff at the request of her counsel for the purpose of preparing himself to testify in her behalf, and he was permitted to testify objectively what he found at the time of the examination. From his evidence he found a scar 2 inches long on her right shin, but mentions no scar or other mark showing the application of external force on her back. He further testified from that examination that he found a swelling over her spine and spasticity of muscles in the region of the fractures, and also that there were two fractures in the vertebrae and a crushing of the inter-vertebral disc between the 11th and 12th dorsal vertebrae. The fractures were at the front of the vertebrae and ran from the anterior surface of the 12th dorsal vertebra through the body back towards the spinal canal, where the spinal cord is carried. The crushing was also at the front of the vertebrae so as to cause a kyphosis or knot to extend outward. He further described this kyphosis as a normal forward bending of the spine, such as produces a knot on the posterior surface of the spine. This one is a short angulation of the region around the 12th dorsal vertebra, caused by a crushing of the body of the 12th, allowing the 11th and 13th vertebrae to come too close to one another, at their anterior or dorsal aspect. As to the lipping to which the doctor testified, he described this by stating that "the upper portion of this vertebra had been pushed out this way, so that this part of the bone projects outwards further than this one or this one, showing a deformity." His testimony was from a reading of certain X-ray pictures offered in evidence.

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above the rail; that after the plaintiff was removed from under
the front end of the car she was taken to the Sunnyside Hospital,
where she was treated by Dr. [unclear], and received attention from
those who were employed by the hospital for that purpose. The physi-
cian who attended the plaintiff at this time was not called as a
witness. There was a witness, Dr. [unclear], who examined the plain-
tiff at the request of her counsel for the purpose of preparing
himself to testify in her behalf, and he was permitted to testify
objectively that he found at the time of the examination, from his
evidence he found a [unclear] 2 inches long on her right shin, but men-
tions no scar on either mark showing the application of external force
on her back. He further testified from that examination that he
found a swelling over her spine and rigidity of muscles in the
region of the [unclear], and also that there were two fractures in the
vertebrae and a crushing of the intervertebral disc between the 11th
and 12th dorsal vertebrae. The fractures were at the front of the
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been pushed out this way, so that this part of the bone projects
outwards further than this one or this one, showing a deformity."
His testimony was from a reading of certain X-ray pictures offered in
evidence.

Plaintiff's external injuries consisted of a 2-inch cut on her right shin; eight bumps on her head and a black eye.

The plaintiff testified that she was in the hospital for 4 months; that she had to lie flat on her back for 3 months with a cast on her hip, and that during these three months she received treatment, and the cast was removed after three months.

Plaintiff further testified that Dr. Schussler, the attending physician, did not continue to take care of her after she left the hospital; that she never saw him again after she left the hospital and was never treated by any other doctor after she left the hospital.

It appears from the hospital records that the plaintiff entered the hospital on February 17, 1934; that she left the hospital on March 31, 1934, and that she was in this hospital for a period of 42 days from the time she was received in the hospital and treated for the injuries sustained by her. There is no evidence in the record that she was unable to walk for a period of four months, nor is there any evidence as to expense or liability incurred by reason of the injuries she suffered from this accident.

While the evidence was largely a question of fact for the jury, still the question of the amount of damages will always be determined by the jury from the facts and circumstances which they believe proven by the evidence. It is to be noted that the doctor did not testify that the injury sustained by the plaintiff was permanent to the extent of interfering with her locomotion, or was such as would prevent her carrying on the work in which she was engaged at the time of the accident.

It is to be noted from the instruction given at the request of the plaintiff on the question of the amount of dam-

Plaintiff's external injuries consisted of a 2-inch cut on her right shin; eight bumps on her head and a black eye.

The Plaintiff testified that she was in the hospital for 4 months; that she had to lie flat on her back for 3 months with a cast on her hip, and that during these three months she received treatment, and the cast was removed after three months. Plaintiff further testified that Dr. Schuster, the attending physician, did not continue to take care of her after she left the hospital; that she never saw him again after she left the hospital and was never treated by any other doctor after she left the hospital.

It appears from the hospital record that the Plaintiff entered the hospital on February 17, 1934; that she left the hospital on March 31, 1934, and that she was in this hospital for a period of 43 days from the time she was received in the hospital and treated for the injuries sustained by her. There is no evidence in the record that she was unable to walk for a period of four months, nor is there any evidence as to expense or disability incurred by reason of the injuries she suffered from this accident.

While the evidence was largely a question of fact for the jury, still the question of the amount of damages will always be determined by the jury from the facts and circumstances which they believe proven by the evidence. It is to be noted that the doctor did not testify that the injury sustained by the Plaintiff was permanent to the extent of interfering with her locomotion, or was such as would prevent her carrying on the work in which she was engaged at the time of the accident.

It is to be noted from the instruction given at the request of the Plaintiff on the question of the amount of dam-

she sustained, the court in this instruction stated:

"In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances pertaining to that subject, proved by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, and such future physical disabilities and loss of health, if any, as the jury may believe from the evidence in this case is reasonably certain to result to the plaintiff by reason of such injuries, if any, the past and future loss in earnings of the plaintiff, if any, is shown by the evidence before you, has or is reasonably certain to result from the injuries, if any, shown by the evidence."

There is no evidence in the record as to the extent of the future physical disabilities and loss of health that are likely to result to the plaintiff. The verdict upon which the court entered judgment was for \$10,000, a substantial one, and not supported by the facts relating to the injuries; nor could the jury apply the above instruction in determining from the facts the amount that should be allowed to the plaintiff for her loss, if any.

The plaintiff relies largely upon the testimony of Dr. Saunders to justify the amount of damages awarded. His testimony described the conditions he found objectively, as well as from an examination of X-rays taken about the time he examined the plaintiff, but the record is silent as to what effect the injuries as described by Dr. Saunders and appearing in the X-rays would have upon plaintiff's condition, from which the jury could determine whether or not her injuries were permanent and would interfere with her enjoying the health she had enjoyed previous to the accident, or with her earning capacity.

Other questions have been called to our attention, but

and sustained, the court in this instruction stated:

"In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances pertaining to that subject, proved by the evidence before them, the nature and extent of plaintiff's physical injuries, if any, and such future physical disabilities and loss of health, if any, as the jury may believe from the evidence in this case is reasonably certain to result to the plaintiff by reason of such injuries, if any, the past and future loss in earnings of the plaintiff, if any, as shown by the evidence before you, how or is reasonably certain to result from the injuries, if any, shown by the evidence."

There is no evidence in the record as to the extent of

the future physical disabilities and loss of health that are likely to result to the plaintiff. The verdict upon which the court entered judgment was for \$10,000, a substantial one, and not supported by the facts relating to the injuries; nor could the jury apply the above instruction in determining from the facts the amount that should be allowed to the plaintiff for her loss, if any.

The plaintiff relies largely upon the testimony of Dr. Saunders to justify the amount of damages awarded. His testimony described the condition as found objectively, as well as from an examination of X-rays taken about the time he examined the plaintiff, but the record is silent as to what effect the injuries as described by Dr. Saunders and appearing in the X-rays could have upon plaintiff's condition, from which the jury could determine whether or not her injuries were permanent and could interfere with her enjoyment of health she had enjoyed previous to the accident, or with her earning capacity.

Other questions have been called to our attention, but

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in view of the fact that we believe the cause should be retried, we hesitate to pass upon the merits other than as stated in this opinion.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P. J.
AND HALL, J. CONCUR.

in view of the fact that we believe the cause should be
 retried, we hesitate to base upon the article other than we
 stated in this opinion.

The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

DEWIS E. SULLIVAN, J. J.
 AND HALL, J. CONCUR.

39167

GEORGE F. KELLER,

(Plaintiff) Appellant,

v.

AUGUST W. GORKE, et al.,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

291 I.A. 613¹

MR. JUSTICE HEHEL DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing plaintiff's bill to foreclose for want of equity.

From the bill it appears that the plaintiff seeks to foreclose defendants' equity of redemption by reason of the execution by the defendants of a trust deed to secure a note for \$1,800, dated October 28, 1932, due one year after date, bearing interest at the rate of 6% per annum, as evidenced by two interest notes for \$54.00 each; payable semi-annually, or upon default in payment of the notes so secured.

Bertha Gorke, one of the defendants, was the owner of a lot in the Village of Oak Park, known as 701 North Harlem Avenue, Oak Park, Illinois, which property is subject to this foreclosure proceeding.

The record discloses that August W. Gorke, husband of Bertha Gorke, acted in her behalf and entered into a contract with the firm of Supplitt Brothers & Dow to erect a filing station at a price of \$10,600, which sum was to be paid in the following manner: \$8,000 in cash, out of the proceeds of a loan made by the Cicero State Bank upon a first mortgage on the premises, payment to be made as the work progressed, and the balance of \$2,600 by the promissory note of Mr. and Mrs. Gorke, dated August 1, 1932, which was turned over to Kiockham L. Supplitt of this firm of contractors, about the date thereof, together with a \$5,000 trust deed owned by the defendants covering other property, which \$5,000 trust deed and note secured

GEORGE A. KELLER,

(Plaintiff) Appellant,

v.

AUGUST A. GORKE, et al.,

(Defendants) Appellees.

CIRCUIT COURT

COOK COUNTY,

2911 A. 613

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing Plaintiff's

bill to foreclose for want of equity.

From the bill it appears that the Plaintiff seeks to

foreclose defendants' equity of redemption by reason of the execution by the defendants of a trust deed to secure a note for \$1,800, dated October 28, 1932, due one year after date, bearing interest at the rate of 6 per annum, as evidenced by two interest notes for \$4.00 each; payable semi-annually, or upon default in payment of the notes so secured.

Bertha Gorke, one of the defendants, was the owner of a lot in the Village of Oak Park, known as 701 North Harlem Avenue, Oak Park, Illinois, which property is subject to this foreclosure proceeding.

The record discloses that August A. Gorke, husband of Bertha Gorke, acted in her behalf and entered into a contract with the firm of Supplitt Brothers & Dow to erect a filling station at a price of \$10,800, which sum was to be paid in the following manner: \$2,000 in cash, out of the proceeds of a loan made by the Chicago State Bank upon a first mortgage on the premises, payment to be made as the work progressed, and the balance of \$8,800 by the promissory note of Mr. and Mrs. Gorke, dated August 1, 1932, which was turned over to Kiekham & Supplitt of this firm of contractors, about the date thereof, together with a \$2,000 trust deed owned by the defendants covering other property, which \$2,000 trust deed and note secured

thereby was given as collateral security for the payment of the \$2,600 note given as the balance of the contract price. The \$2,600 was made payable in monthly installments of \$50, the full balance remaining unpaid becoming due one year after date.

The contractors sublet the concrete work, consisting of the foundation of the building, the floor thereof, and the driveway and walk approaches thereto, to August O. Peterson, who was engaged in business as a contractor. Peterson proceeded with his part of the work, beginning shortly after April 5, 1932, the date of his verbal agreement with Supplitt. He completed his work, together with certain extra work in the nature of an additional sidewalk, on June 25, 1932, at which time there remained a balance of \$1,857.94 due him. He had been paid \$500 on account and this balance remained unpaid.

There is evidence that 60 days after Peterson completed his work he caused a written notice of his claim to be served personally on Bertha Gorke, the owner of the premises, said notice being the usual sub-contractor's mechanic's lien notice, claiming a lien for said balance upon the gas filling station property. The defendants Gorke disclaim the receipt of such notice. No response in the way of payment having been made after service of notice, Peterson filed his bill for mechanic's lien against the defendants, as owners, and Supplitt Brothers & Dow, the contractors, for the enforcement of his mechanic's lien against the premises, with the usual prayer for sale in event of non-payment after decree.

After the service of summons upon the defendants in the mechanic's lien suit, Mr. Gorke requested a conference with August O. Peterson at the office of Peterson's attorney. Peterson had bought his materials from George F. Keller, the plaintiff in this case, to whom there is due the sum of \$1,857.94, and Peterson brought Chris Henderson with him to this conference to represent Keller.

thereby was given a collateral security for the payment of the \$2,800 note given as the balance of the contract price. The \$2,800 was made payable in monthly installments of \$50, the full balance remaining unpaid becoming due one year after date.

The contractors under the contract work, consisting of the foundation of the building, the floor thereof, and the driveway and walk approaches thereto, to August C. Peterson, who was engaged in business as a contractor. Peterson proceeded with his part of the work, beginning shortly after April 5, 1932, the date of his verbal agreement with Guffitt. He completed his work, together with certain extra work in the nature of an additional sidewalk, on June 25, 1932, at which time there remained a balance of \$1,837.94 due him. He had been paid \$500 on account and this balance remained unpaid.

There is evidence that 30 days after Peterson completed his work he caused a written notice of his claim to be served personally on Martha Guffitt, the owner of the premises, said notice being the usual sub-contractor's mechanic's lien notice, claiming a lien for said balance upon the real filling station property. The defendants Guffitts disclaim the receipt of such notice. No response in the way of payment having been made after service of notice, Peterson filed his bill for mechanic's lien against the defendants as owners, and Guffitt Brothers & Dow, the contractors, for the enforcement of his mechanic's lien against the premises, with the usual prayer for a sale in event of non-payment after decree. After the service of summons upon the defendants in the mechanic's lien suit, Mr. Burke requested a conference with August C. Peterson at the office of Peterson's attorney. Peterson had bought his materials from George W. Keller, the plaintiff in this case, so how there is due the sum of \$1,837.94, and Peterson brought this lien suit with him to this conference to represent Keller.

The conference was held on or about October 26, 1932, at the office of William A. Peterson, the attorney who represented August O. Peterson the sub-contractor, and there were present at the conference: Attorney Peterson, Peterson the sub-contractor, August W. Gorke, Kickham L. Supplitt and Chris Henderson, representing George F. Keller. Mr. Gorke stated that he arranged the meeting that evening to see if they could come to some settlement agreement. Gorke stated that he wanted Supplitt to fix the thing up, but Henderson said there was no chance of Supplitt fixing up anything; that if there was anything to be fixed up it was going to be fixed up by Gorke, Peterson, and himself (Henderson). It then appears that Gorke asked Henderson what he wanted to do, and he stated he wanted Gorke to produce the money to pay the bill. As a result the mortgage, the subject of this foreclosure, was executed by defendants Gorke.

It appears from the facts that before the execution of the trust deed in question the defendants had been served with a summons in the mechanic lien proceeding instituted by Peterson, and that Supplitt came to the home of the defendants Gorke, and wanted them to execute a second mortgage because of this litigation regarding the enforcement of the foreclosure of the mechanic lien on this property, and when they inquired of Supplitt as to the amount of money they had paid him, he stated, in effect, that he was able to collect only \$600 on the \$2600 note that was executed by the defendants Gorke, and Supplitt requested that the note be executed for \$1,800. The note was executed and delivered on condition that when \$800 was paid the \$2,600 note and the \$5,000 security were to be returned to the defendants. Mrs. Gorke called to Supplitt's attention the fact that the filling station was not completed, and that she did not care to sign the second mortgage unless Peterson put the building in good shape, and Supplitt stated he would see that Peterson completed his contract. The junior mortgage, which was executed, was in the nature

The conference was held on or about October 25, 1933, at the office of William A. Peterson, the attorney who represented August G. Peterson the sub-contractor, and there were present at the conference: Attorney Peterson, Peterson the sub-contractor, August G. Gorka, Nicholas D. Supplitt and Charles Henderson, representing George F. Keller. Mr. Gorka stated that he arranged the meeting that evening to see if they could come to some settlement agreement. Gorka stated that he wanted Supplitt to fix the thing up, but Henderson said there was no chance of Supplitt fixing up anything; that if there was anything to be fixed up it was going to be fixed up by Gorka, Peterson, and himself (Henderson). It then appears that Gorka asked Henderson what he wanted to do, and he stated he wanted Gorka to produce the money to pay the bill. As a result the mortgage, the subject of this foreclosure, was executed by defendants Gorka. It appears from the facts that before the execution of the trust deed in question the defendant had been served with a summons in the mechanic lien proceeding instituted by Peterson, and that Supplitt came to the home of the defendants Gorka, and wanted them to execute a second mortgage because of this litigation regarding the enforcement of the foreclosure of the mechanic lien on this property, and when they inquired of Supplitt as to the amount of money they had, and his, he stated, in effect, that he was able to collect only \$500 on the \$500 note that was executed by the defendants Gorka, and Supplitt requested that the note be executed for \$1,500. The note was executed and delivered on condition that the \$500 was paid the \$2,500 note and the \$500 security were to be returned to the defendants. Mrs. Gorka called to Supplitt's attention the fact that the filing station was not completed, and that she did not care to sign the second mortgage unless Peterson put the building in good shape, and Supplitt stated he would see that Peterson completed his contract. The junior mortgage, which was executed, was in the nature

of a trust deed, naming Supplitt as trustee. Supplitt handed this mortgage to Peterson's attorney, as security for Supplitt's individual indebtedness evidenced by Supplitt's individual notes for \$1,850. Delivery of this mortgage to Supplitt was conditional. It is apparent from the testimony of August Peterson, the sub-contractors used jacks to protect the foundation, which had settled, and that cracks were appearing in the walls. At the time of the execution of the junior mortgage and delivery to Supplitt, the defendants did not learn until after the execution of the mortgage that Supplitt had received from a Mr. McClory the full \$2,600 on their note, and in order to redeem the collateral which had been deposited for the payment of the \$2,600 note, the balance of the contract price, defendants paid McClory the full \$2,600 plus interest. Therefore, it appears that when the junior mortgage was executed, Supplitt had received on behalf of his firm the full contract price for the construction of the filling station, and that by his representation/ that he had received but \$600 of the \$2,600 he induced the defendants to execute the trust deed for \$1,800, the subject of this litigation.

The general rule applicable to an assignee of a mortgage or trust deed is that he takes it subject to all infirmities to which it is liable in the hands of the mortgagee; and, in equity, the mortgagor is entitled to every defense against the assignee which he could have made against the original mortgagee. This is so even though the assignee purchases the trust deed and notes for value and in good faith without knowledge of the infirmities.

From the evidence in this particular case it is clear that the purpose of the execution of this junior mortgage by the defendants Gorke was to pay up the balance of the contract price due the Supplitt firm upon the representation by Supplitt that he was unable to dispose of the \$2,600 note signed by the Gorkes, supported by the collateral which was deposited to secure payment. As a matter

of a trust deed, naming Supplier as trustee. Plaintiff named this mortgage to Defendant's attorney, as security for Supplier's individual indebtedness evidenced by Supplier's individual notes for \$1,000. Delivery of this mortgage to Supplier was conditional. It is apparent from the testimony of Plaintiff's attorney, the sub-venturers used Jacks to protect the foundation, which had settled, and that cranks were appearing in the field. At the time of the execution of the Junior mortgage and delivery to Supplier, the defendant did not learn until after the execution of the mortgage that Supplier had received from a Mr. McGloory the full \$2,500 on their note, and in order to redeem the collateral which had been deposited for the payment of the \$2,500 note, the balance of the contract price, defendant paid McGloory the full \$2,500 plus interest. Therefore, it appears that when the Junior mortgage was executed, Supplier had received on behalf of his firm the full contract price for the construction of the filling station, and that his representation that he had received the \$2,500 on the \$2,500 note induced the defendant to execute the trust deed for \$1,000, the subject of this litigation. The General Rule applicable to an assignee of a mortgage or trust deed is that he takes it subject to all incumbrances to which it is liable in the hands of the assignor; and, in equity, the mortgagee is entitled to every defense against the assignor which he could have made against the original mortgagee. This is so even though the assignee purchases the trust deed and notes for value and in good faith without knowledge of the incumbrances. From the evidence in this particular case it is clear that the purpose of the execution of this Junior mortgage by the defendant was to pay up the balance of the contract price due the Supplier firm upon the representation by Supplier that he was unable to dispose of the \$2,500 note signed by the bank, supported by the collateral which was deposited to secure payment. As a matter

of fact, it appears that Supplitt had collected the \$2,600, and had transferred and delivered the note to a Mr. McClory, and the defendants were obliged to pay the \$2,600 to Mr. McClory, in order to have returned the collateral they deposited as security.

The facts indicate that Supplitt by fraudulent representation, and on which the defendants relied, induced them to execute the junior mortgage securing the \$1,800, which appears to have been delivered to George F. Keller, the material man, in payment of what he claims was material delivered not only to the premises in question, but also to Peterson on other contract work which Peterson had and for which Keller claims part of the amount due. Supplitt being the trustee named in the trust deed and having had possession of the notes secured thereby, receipt of the trust deed by Keller was notice to him that contractor Supplitt, who erected the filling station, acted as trustee, and it was Keller's duty to inquire of the Gorkes under what terms and upon what conditions this junior mortgage was executed.

In the case of Owens v. Nagel, 334 Ill. 96, the court announced the following rule:

"The great weight of authority, as well as the better reasoning, favors the rule that the word 'trustee' * * * is sufficient to charge a purchaser with notice of restrictions and limitations imposed on the trustee's power to dispose of the instrument."

It is evident that if Supplitt as trustee sought to foreclose the trust deed in question, a defense would be good as against this trustee based upon the facts above outlined. The question then arises: Is this defense good as against Keller, the holder of the notes secured by the trust deed?

The rule which applies appears in Reeve Illinois Mortgages, Vol. 1, Sec. 246, p. 294, wherein the author states:

"It is fundamental, and established by a very long line of decisions, that, in equity, the doctrine of innocent purchaser for value, which applies to ordinary commercial paper, has no

of fact, it appears that Gupfitt had collected the \$2,500, and had transferred and delivered the note to Mr. McJory, and the defendants were obliged to pay the \$2,500 to Mr. McJory, in order to have returned the collateral they deposited as security.

The facts indicate that Gupfitt by fraudulent representation, and on which the defendants relied, induced them to execute the junior mortgage securing the \$1,800, which appears to have been delivered to George A. Keller, the material man, in payment of that he claims was material delivered not only to the premises in question, but also to Peterson on other contract work which Peterson had and for which Keller claims part of the amount due. Gupfitt being the trustee named in the trust deed and having had possession of the notes secured thereby, receipt of the trust deed by Keller was notice to him that contract Gupfitt, who executed the filling station, acted as trustee, and it was Keller's duty to inquire of the books under that term and learn that condition this junior mortgage was executed.

In the case of Gagne v. Gagne, 224 Ill. 35, the court

announced the following rule:

"The great weight of authority, as well as the better reasoning, favors the rule that the word 'trustee' is sufficient to charge a purchaser with notice of restrictions and limitations imposed on the trustee's power to dispose of the instrument."

It is evident that if Gupfitt as trustee sought to foreclose the trust deed in question, a defense would be good as against this trustee based upon the facts above outlined. The question then arises: Is this defense good as against Keller, the holder of the notes secured by the trust deed?

The rule which applies here is in Illinois trusts,

Vol. I, Sec. 248, p. 254, wherein the author states:

"It is fundamental, and established by a very long line of decisions, that, in equity, the doctrine of innocent purchaser for value, which applies to ordinary commercial paper, has no

application to a mortgage. The purchaser or assignee of a mortgage or trust deed takes it subject to all the infirmities to which it is liable in the hands of the mortgagee, and in equity the mortgagor is entitled to every defense against the assignee which he could have made against the original mortgagee."

The author further states in Sec. 269, p. 318:

"Of course the owner of mortgage securities, as such, can convey no better title than that which he himself can enforce, therefore the assignee of a mortgage occupies no better position than his assignor. (Kratzmeier v. Weissman, 235 Ill. App. 305.)"

The evidence indicates that the outstanding note for \$2,600, secured by the Maywood mortgage as collateral, was not returned to the defendants, defective workmanship on the building was not repaired, and upon payment by the Gorkes of the balance of the contract price the junior mortgage was not cancelled and returned to the defendants. When return of the \$2,600 note and \$5,000 mortgage was requested, defendants were referred to Mr. McClory, from whom they learned for the first time that Supplitt had been untruthful and had obtained the full \$2,600 from McClory. To redeem the security from McClory, defendants were compelled to pay the \$2,600. It then appears that Mrs. Gorke demanded return of the \$1,800 junior mortgage involved in this appeal, in accordance with the understanding had at the time of its delivery. The defendants point out in their brief that when this demand took place at the Cicero State Bank, Mrs. Gorke said, "Now, Mr. Supplitt, I paid Mr. McClory the \$2,600; now I want my junior mortgage back." He said, "Well, I ain't got it; what are you going to do about it?" Then he walked out.

As we have stated in our opinion, Keller, the plaintiff, received the trust deed and the notes when they were delivered by Mr. Supplitt, the trustee, and now seeks to recover this money in order to apply the amount in payment of the materials delivered to Peterson, which included materials charged against his account for supplies on jobs other than the one involved in this appeal. Therefore, subject to the rules outlined in our opinion, the defense

application to a mortgage. The purchaser or assignee of a mortgage or trust deed takes it subject to all the liabilities to which it is liable in the hands of the mortgagee, and in equity the mortgagee is entitled to every defense against the assignee which he could have against the original mortgagee."

The author further states in Sec. 263, p. 218:

"Of course the owner of mortgage securities, as such, can convey no better title than that which he himself owns; therefore, the assignee of a mortgage acquires no better position than his assignor. (Ex parte v. Ex parte, 235 Ill. App. 305.")

The evidence indicates that the outstanding note for \$2,000,

secured by the Maywood mortgage as collateral, was not returned to the defendants, defective workmanship on the building was not repaired, and upon payment by the Gorkes of the balance of the contract price the junior mortgage was not cancelled and returned to the defendants. Upon return of the \$2,000 note and \$5,000 mortgage was requested, defendants were referred to Mr. McGlory, from whom they learned for the first time that Guppitt had been untruthful and had obtained the full \$5,000 from McGlory. To redeem the security from McGlory, defendants were compelled to pay the \$2,000. It then appears that Mrs. Gorkes demanded return of the \$1,800 junior mortgage involved in this case, in accordance with the understanding had at the time of its delivery. The defendants point out in their brief that when this demand took place at the Chicago State Bank, Mrs. Gorkes said, "Now, Mr. Guppitt, I wish my security the \$2,000; now I want my junior mortgage back." He said, "Well, I ain't got it; what are you going to do about it?" Then he walked out. As we have stated in our opinion, earlier, the plaintiff received the trust deed and the notes when they were delivered by Mr. Guppitt, the trustee, and now seeks to recover this money in order to apply the amount in payment of the materials delivered to Peterson, which included materials on filed against his account for supplies on jobs other than the one involved in this case. Therefore, subject to the rules outlined in our opinion, the defense

offered by these defendants Gorke was a proper one.

The plaintiff contends that even if it were proper for the court in this case to inquire into the merits of the original controversy between the firm of Supplitt Brothers & Dow and the defendants Gorke, the burden was upon the defendants to prove that Peterson had no right to a lien for the unpaid balance in order to establish a defense of failure of consideration.

To this contention the defendants reply by stating that an accord and satisfaction requires full knowledge of the facts; good faith; an honest dispute between the same parties, and the surrender of a well founded claim.

At the time Supplitt delivered the trust deed and the note a letter was addressed to Mr. August O. Peterson, Western Springs, Illinois, dated October 29, 1932, reading as follows:

"Dear Sir: I hand you herewith the note of Kickham L. Supplitt and Francis J. Supplitt, together with junior mortgage of Eighteen Hundred Dollars, made by Bertha Gorke and August W. Gorke, dated October 28, 1932. The delivery of this note and junior mortgage does not settle the controversy respecting the work done on floor, in grease pit, office, etc.; also unfinished condition of walls in basement of grease room etc. Mr. Gorke is holding me directly responsible for this work being made satisfactory.

Sincerely yours,
Supplitt Brothers & Dow."

This, in a measure, seems to corroborate the evidence of the Gorke's that there was an understanding that the work was not completed as provided for in the contract, and that the trust deed and note were not to be delivered until this work was completed.

It is also contended that a sub-contractor's notice as provided for by statute on mechanics' liens was not served on the defendants Gorke within the 60 days required by the statute. The defendants deny ever having received such notice, and in support of their denial, there is evidence that William Peterson, attorney for August Peterson, stated that he had not served a lien notice, but instead filed a sub-contractor's lien in the Circuit Court of

offered by these defendants Gorko was a proper one.

The Plaintiff contends that even if it were proper for the court in this case to inquire into the merits of the original controversy between the firm of Supplitt Brothers & Dow and the defendants Gorko, the burden was upon the defendants to prove that Peterson had no right to a lien for the unpaid balance in order to establish a defense of failure of consideration.

To this contention the defendants reply by stating that an accord and satisfaction recites full knowledge of the facts; good faith; an honest dispute between the same parties, and the surrender of a well founded claim.

At the time Supplitt delivered the trust deed and the note a letter was addressed to Mr. August O. Peterson, Western Springs, Illinois, dated October 28, 1932, reading as follows:

"Dear Sir: I hand you herewith the note of Nicholas J. Supplitt and Francis J. Supplitt, together with joint mortgage of Eighteen Hundred Dollars, made by Bertha Gorko and August W. Gorko, dated October 28, 1932. The delivery of this note and junior mortgage does not settle the controversy respecting the work done on floor, in garage, in office, etc.; also unfinished condition of walls in basement of garage room, etc. Mr. Gorko is holding me directly responsible for this work being made satisfactory.

Sincerely yours,
Supplitt Brothers & Dow."

This, in a measure, seems to corroborate the evidence of the Gorko's that there was an understanding that the work was not completed as provided for in the contract, and that the trust deed and note were not to be delivered until this work was completed.

It is also contended that a sub-contractor's notice as provided for by statute on mechanics' liens was not served on the defendants Gorko within the 60 days required by the statute. The defendants deny ever having received such notice, and in support of their denial, there is evidence that William Peterson, attorney for August Peterson, stated that he had not served a lien notice, but instead filed a sub-contractor's lien in the Circuit Court of

Cook County. Section 24, ch. 82 of the Mechanics' Lien Act expressly provides that the sub-contractor " * * * shall within 60 days * * * cause a written notice of his claim * * * to be personally served on the owner or his agent, etc." and in Liese v. Mentze, 328 Ill. 833, it was held that a wife's interest in property could not be affected by service of a lien notice even on the husband, though the husband had a joint interest in the property. It appears that this subject was discussed before the trial. The defendants contend that there was no testimony that a 60 day notice was served, but there is an allegation to that effect in an uncertified copy of an unsworn bill, which was introduced over defendants' objection. However, no evidence was offered by the plaintiff that a notice of the kind required by the statute was served on Bertha Gorke and August W. Gorke, her husband; nor any evidence which would contradict defendants' denial that there was such service of notice. The evidence in the record does not establish that Peterson was entitled to a mechanic's lien on the property, as it is not clear that a sub-contractor's notice was filed as required by statute. Therefore when he dismissed his suit to foreclose the mechanic's lien, he could not recover on the facts as stated in this record. In any event, we believe that in this foreclosure proceeding the material question presented to this court is whether the plaintiff in this action could recover in the foreclosure proceeding upon the facts as they appear from the evidence offered by the parties.

Plaintiff as assignee of the trust deed securing the notes accepted them subject to the defenses which could be offered against Supplitt, the trustee, and according to the reasoning of courts of appeal on this question, plaintiff could not recover.

We have considered the questions pertaining to the material points raised, and believe the court did not err in overruling the exceptions to the Master's report and in approving the report. Therefore the decree here on appeal is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN, P.J. and HALL, J. CONCUR.

DEWIS, J. SULLIVAN, P. J. AND J. J. CONNOR

39175

JOSEPH PALOZZOLA, Administrator of
the Estate of Joseph Monaco, Deceased,

(Plaintiff) Appellee,

v.

PETER FEE, et al.

On Appeal of Peter Fee,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

291 I.A. 613²

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant Peter Fee appeals from a judgment in the sum of \$5,000 entered by the court, without a jury, in an action for wilful and wanton conduct in the operation of an automobile by this defendant, which caused the death of plaintiff's intestate, Joseph Monaco. As to the other defendant, Michael Fee, the court entered a finding of not guilty.

The accident occurred on October 17, 1935, at the intersection of Wentworth Avenue and 23rd Street in Chicago, Illinois. The complaint consists of two counts filed by the plaintiff, wherein it is alleged that both defendants so carelessly operated an automobile upon the streets of Chicago, that said automobile collided with Joseph Monaco after he had alighted from a Wentworth Avenue street car at the intersection above stated, while he was in the exercise of due care, and caused the death of plaintiff's intestate.

The following count charged -

"That the defendant, Michael M. Fee, by and through his duly authorized agent, Peter Fee, drove his said automobile at the time and place aforesaid with a reckless disregard of circumstances and a conscious indifference to the rights of others rightfully on said intersection and contrary to the Statutes of the City of Chicago, and State of Illinois in such cases made and provided, by reason thereof, the said motor vehicle, which said defendants were driving, in such unlawful manner, wilfully and wantonly and with great force and violence did drive his said motor vehicle against and upon the person of the plaintiff's intestate who was then and there rightfully upon the intersection as aforesaid thereby causing the death of plaintiff's intestate as hereinbefore set forth."

JOSEPH HADJIOKOLA, Administrator of
the Estate of Joseph Hadjiohola, Deceased,

(Plaintiff) vs.

Peter Lee, et al.
On Appeal of Peter Lee,

(Defendant) Appellant.

ALLIANCE
LAWYERS
COUNCIL

2011.A.613

MR. JUSTICE HADJIOKOLA THE JUDGE OF THE COURT.

The defendant Peter Lee appeals from a judgment in the sum of \$5,000 entered by the court, without a jury, in an action for willful and wanton conduct in the operation of an automobile by this defendant, which caused the death of plaintiff's intestate, Joseph Hadjiohola. As to the other defendant, Michael Lee, the court entered a finding of not guilty.

The accident occurred on October 17, 1933, at the intersection of East Fifth Avenue and 32nd Street in Chicago, Illinois. The complaint consists of two counts filed by the plaintiff, wherein it is alleged that both defendants are criminally negligent in operating upon the streets of Chicago, that said automobile collided with Joseph Hadjiohola who was traveling from a southerly avenue street corner at the intersection above stated, while he was in the exercise of due care and used the death of plaintiff's intestate.

The following count charges -

"That the defendant, Michael Lee, by and through his duly authorized agent, Peter Lee, drove his said automobile at the time and place aforesaid with a reckless disregard of circumstances and a conscious indifference to the rights of others in violation of the laws of the State of Illinois in such cases made and provided, by reason thereof, that said motor vehicle, which is a motor vehicle, was driven in such unlawful manner, willfully and wantonly and with great force and violence did drive his said motor vehicle against and upon the person of the plaintiff's intestate who was then and there lawfully upon the intersection aforesaid thereby causing the death of plaintiff's intestate as hereinbefore set forth."

The defendant, Peter Fee, contends that the evidence does not sustain the finding of wilful and wanton conduct as alleged in the count set forth above. While there is no conflict in the evidence of the plaintiff and the defendant except as to the place where the deceased was walking and as to the speed of the automobile at the time of the accident, there is a conflict as to these facts, and any discrepancy in the testimony was for the court to consider, and no doubt it did when the judgment was entered upon the court's finding.

The defendant, however, upon this appeal contends that the judgment is against the manifest weight of the evidence. The facts indicate that the plaintiff's intestate after alighting from the street car looked both ways; that is to the north and south, and then walked to the west in crossing at the street intersection. At the time this accident occurred on October 17, 1935, about 7:45 p.m. the light was good; the plaintiff's intestate was plainly seen, and this was testified to by all of the witnesses heard by the court, so that this court will take into consideration that Joseph Monaco at the time and place in question was seen by all of the parties, including the persons riding in the automobile being operated by Peter Fee; the automobile which was driven by Peter Fee when 100 feet away from the place where the accident occurred was going at a speed of from 40 to 45 miles per hour in a closely built up neighborhood, and as the automobile approached the intersection in question it was running at a speed of from 20 to 25 miles per hour.

There is evidence in the record that as the automobile approached the place of the accident, and about 10 to 15 feet from the place where plaintiff's intestate was struck, the driver, Peter Fee, suddenly swerved the automobile to the left or west and seeing another automobile approaching from the north, in order to avoid a collision with this oncoming car, suddenly swerved back in an easterly

The defendant, Peter Lee, contends that the evidence does not sustain the finding of willful and wanton conduct as alleged in the count set forth above. While there is no conflict in the evidence of the plaintiff and the defendant except as to the place where the deceased was walking and as to the speed of the automobile at the time of the accident, there is a conflict as to these facts, and any discrepancy in the testimony was for the court to consider, and no doubt it did when the judgment was entered upon the court's finding. The defendant, however, upon this special verdict that the judgment is against the manifest weight of the evidence. The facts indicate that the plaintiff's intestate after alighting from the street car looked both ways; that it is to the north and south, and then walked to the west in crossing at the street intersection. At the time this accident occurred on October 17, 1931, about 7:45 p.m. the light was good; the plaintiff's intestate was plainly seen, and this was testified to by all of the witnesses heard by the court, so that this court will take into consideration that Joseph Monahan at the time and place in question was seen by all of the parties, including the persons riding in the automobile being operated by Peter Lee; the automobile which was driven by Peter Lee was 100 feet away from the place where the accident occurred was going at a speed of from 40 to 45 miles per hour in a closely built up neighborhood, and as the automobile approached the intersection in question it was running at a speed of from 30 to 35 miles per hour. There is evidence in the record that as the automobile approached the place of the accident, and about 10 to 15 feet from the place where plaintiff's intestate was struck, the driver, Peter Lee, suddenly swerved the automobile to the left or west and seeing another automobile approaching from the north, in order to avoid a collision with that oncoming car, suddenly swerved back in an easterly

direction and struck Joseph Monaco, who was on the street car tracks at that point; that plaintiff's intestate was thrown by the force of the collision about 8 feet east and north, and the automobile controlled by Peter Fee ran a distance of from 60 to 65 feet before it was stopped.

The defendant, however, points to the evidence that Joseph Monaco stepped into the right hand side of the car and was struck by the door handle when the defendant swerved the automobile to the west in order to avoid striking him.

The evidence upon the speed of the automobile which caused the injuries from which Joseph Monaco died, is conflicting. The trial court properly found that the defendant, Peter Fee, in the operation of his automobile from 20 to 25 miles per hour at the time of the accident in question did so in utter disregard of the rights of Joseph Monaco, who was properly upon the intersection at the time. The defendant at a distance of 100 feet saw this man at the intersection of the street, and while he claims he sounded the horn as a warning, still he came on at a speed which under the circumstances was wilful and wanton and in reckless disregard of the position of Joseph Monaco, and indicating an indifferent attitude toward the right of plaintiff's intestate to be at the intersection at the time in question.

At the time of the accident there was in force an ordinance of the City of Chicago, entitled, "Uniform Traffic Code", Article IV, Sec. 15, which provides:

"Pedestrians' Rights & Duties.

The operator of any vehicle shall yield the right of way to a pedestrian crossing the roadway within any cross-walk as defined herein except where the movement of traffic is being regulated by police officers or official traffic signals or at any point where a pedestrian tunnel or overhead crossing has been provided."

At the point where the accident occurred it does not appear from the record that the movement of traffic was being regulated by

direction and struck Joseph Monaco, who was on the street car track at that point; that plaintiff's intent to be thrown by the force of the collision about 2 feet east and north, and the automobile controlled by Peter Lee ran a distance of from 20 to 25 feet before it was stopped.

The defendant, however, points to the evidence that Joseph Monaco stepped into the right hand side of the car and was struck by the door handle when the defendant averted the automobile to the west in order to avoid striking him.

The evidence upon the speed of the automobile which caused the injuries from which Joseph Monaco died, is conflicting. The trial court properly found that the defendant, Peter Lee, in the operation of his automobile from 20 to 25 miles per hour at the time of the accident in question did so in utter disregard of the rights of Joseph Monaco, who was properly upon the intersection at the time. The defendant at a distance of 100 feet saw this man at the intersection of the street, and while he claims he sounded the horn as a warning, still he came on at a speed which under the circumstances was willful and malicious and in reckless disregard of the position of Joseph Monaco, and indicating an indifferent attitude toward the right of plaintiff's interest to be at the intersection at the time in question.

At the time of the accident there was in force an ordinance of the City of Chicago, entitled, "Uniform Traffic Code", Article IV, Sec. 15, which provides:

"Pedestrians; Rights & Duties."

The operator of any vehicle shall yield the right of way to a pedestrian crossing the roadway within any crosswalk as defined herein except where the movement of traffic is being regulated by police officers or official traffic signals or at any point where a pedestrian tunnel or overpass crossing has been provided."

At the point where the accident occurred it does not appear from the record that the movement of traffic was being regulated by

police officers or official traffic signals. This ordinance would indicate that at the time and place in question it was the duty of Peter Fee to yield the right of way to the pedestrian Joseph Monaco.

There are several elements in this case which clearly establish that the operation of the automobile was wilful and wanton and in disregard of the rights of Joseph Monaco, who was upon the street at the place where the accident occurred and was seen by the driver of this automobile when the car was 100 feet away.

Another element which the court will take into consideration is that Peter Fee and the other occupants of the car were on their way to attend a meeting, and that the speed of the car was not compatible with the safety of pedestrians on the street. This appears from the admission of Peter Fee's father that he warned the driver not to drive so fast. When plaintiff's intestate was on the street at the intersection the speed at the time of the accident was lessened to between 20 and 25 miles an hour. The evidence also indicates, as we have stated before, that the defendant tried to avoid the accident when he swerved, but was too late. He was obliged to swerve back again upon the street car tracks because of an approaching car, and when he did so, plaintiff's intestate was struck, and as a result died. This is what the trial court believed when it found the defendant guilty of wilful and wanton conduct in driving this car and entered the judgment from which this appeal has been taken.

The defendant also contends that the court erred in finding the defendant Peter Fee guilty of wilful and wanton conduct under the allegations of the complaint and in entering judgment against him. We believe that under the allegations as set forth in this opinion the facts were sufficient for the purposes of the trial and that the court was justified in entering judgment for the plaintiff.

police officers or official traffic signals. This condition would indicate that at the time and place in question it was the duty of Peter Lee to yield the right of way to the defendant Joseph Hancock.

There are several elements in this case which clearly establish that the operation of the automobile was willful andanton and in disregard of the right of Joseph Hancock, who was upon the street at the place where the accident occurred and was being by the driver of this automobile when the car was last seen.

Another element which the court will take into consideration is that Peter Lee and the other occupants of the car were on their way to attend a meeting, and that the speed of the car was not compatible with the safety of pedestrians on the street. This appears from the admission of Peter Lee's father that he turned the driver not to drive so fast. When Plaintiff's interest was on the street at the intersection the speed at the time of the accident was lessened to between 10 and 25 miles an hour. The evidence also indicates, as we have stated before, that the defendant tried to avoid the accident when he arrived, but was too late. He was obliged to arrive back again upon the street on a track because of an approaching car, and when he did so, Plaintiff's interest was struck, and as a result died. This is what the trial court believed when it found the defendant guilty of willful andanton conduct in driving this car and entered the judgment from which this appeal has been taken.

The defendant also contends that the court erred in finding the defendant liable for guilt of willful andanton conduct under the allegations of the complaint and in entering judgment against him. He believes that under the allegations as set forth in this opinion the facts were sufficient for the purposes of the trial and that the court was justified in entering judgment for the plaintiff.

What is wilful and wanton conduct in the driving of an automobile is always a question of fact to be determined from all the evidence and circumstances before the court. It is hardly necessary to cite cases on the question, as each case is dependent upon the facts as they appear in the record, and it is from these facts that the court determines whether or not there was wilful and wanton conduct as defined by the authorities.

For the reasons stated in this opinion the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

What is willful and wanton conduct in the driving of an automobile is always a question of fact to be determined from all the evidence and circumstances before the court. It is hardly necessary to cite cases on the question, as each case is dependent upon the facts as they appear in the record, and it is from these facts that the court determines whether or not there was willful and wanton conduct as defined by the authorities.

For the reasons stated in this opinion the judgment

is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P. J. AND CHIEF J. CONCUR.

39199

J. A. BURGESS, trading as J. A. BURGESS)
& COMPANY,

(Plaintiff) Appellee,

v.

CHARLES RUDOLPH,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

291 I.A. 613³

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff filed in the Municipal Court of Chicago to recover from the defendant for work, labor and material furnished and delivered to the defendant at the special instance and request of the defendant for an agreed price, also upon an account stated in the sum of \$303.50 due the plaintiff. There was a trial by the court without a jury, which resulted in a judgment against the defendant for \$303.50, from which the defendant has taken this appeal.

The plaintiff was engaged in the business of making photostats. Defendant is an attorney at law practicing in Chicago. The action was to recover for certain photostatic work delivered to the defendant in the case of Krejci v. Home Bank & Trust Company, in the Circuit Court of Cook County, in which the defendant was the attorney for the Home Bank & Trust Company.

There seems to be no dispute that the photostats prepared by the plaintiff were delivered on the dates and in the amounts claimed by the plaintiff, but the controversy is on the question of whether the work was ordered by the defendant as the agent for the Home Bank & Trust Company, and that at the time the order was given the plaintiff was informed that the defendant's principal, the Home Bank & Trust Company, would pay for the work.

There is evidence that Mr. Burgess, the plaintiff, testified he was called to the defendant's office to estimate the job of photostatic work; that the work was to be used for the bank; that plaintiff

J. A. BURROUGHS, trading as J. A. BURROUGHS & COMPANY,
(Plaintiff) (Appellee)
v.
CHARLES RUDOLPH,
(Defendant) (Appellant).

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

This is an action by the plaintiff filed in the Circuit Court of Chicago to recover from the defendant for work, labor and material furnished and delivered to the defendant at the special instance and request of the defendant for an agreed price, also upon an account stated in the sum of \$303.50 due the plaintiff. There was a trial by the court without a jury, which resulted in a judgment against the defendant for \$303.50, from which the defendant has taken this appeal.

The plaintiff was engaged in the business of making photographs. Defendant is an attorney at law practicing in Chicago. The action was to recover for certain photographic work delivered to the defendant in the case of Reich v. Home Bank & Trust Company, in the Circuit Court of Cook County, in which the defendant was the attorney for the Home Bank & Trust Company.

There seems to be no dispute that the photographs prepared by the plaintiff were delivered on the dates and in the amounts claimed by the plaintiff, but the controversy is on the question of whether the work was ordered by the defendant as the agent for the Home Bank & Trust Company, and that at the time the order was given the plaintiff was informed that the defendant's principal, the Home Bank & Trust Company, would pay for the work.

There is evidence that Mr. Burgess, the plaintiff, testified he was called to the defendant's office to estimate the job of photographic work; that the work was to be used for the bank; that plaintiff

inquired of Mr. Rudolph, the defendant, and was advised by him that the Krejci case was coming on for hearing and he had a number of exhibits that he wished to use; that he inquired about the price of the photostatic work to be done, and that he quoted a certain price per page and was referred by the defendant to Mr. Ray, the attorney in charge of the work in Mr. Rudolph's office.

There is evidence that after the photostats were delivered to the defendant, he received from the plaintiff bills for services rendered amounting to the sum of \$303.50 and payment requested. The defendant testified on this subject: "I received statements from the plaintiff almost monthly after the work referred to was delivered; those statements were made out to me; did not send any back to plaintiff. I don't think I complained when these statements were received that they were incorrectly charged."

The question of fact in this case was a controverted one, and there is evidence which fully justified the trial court in its finding against the defendant and in entering judgment for the amount appealed from.

The defendant raises the question that at the close of the hearing the court rather intimated that he would find for the defendant and continued the cause for sometime later, when he entered this judgment. However, the court entered no finding at the time it is claimed he was convinced the defendant was not liable, and from the record no order was entered until the finding was entered in the case for the plaintiff against the defendant in the sum of \$303.50. The finding is not against the manifest weight of the evidence, and not being so, this court is not in a position to consider the controverted questions of fact in the case. The court having passed upon them and entered judgment against the defendant, which we believe was a proper one, the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

Inquired of Mr. Rudolph, the defendant, and was advised by him that the Kresel case was coming on for hearing and he had a number of exhibits that he wished to use; that he inquired about the price of photostatic work to be done, and that he asked a certain price per page and was referred by the defendant to Mr. Ray, the attorney in charge of the work in Mr. Rudolph's office.

There is evidence that after the photostats were delivered to the defendant, he received from the plaintiff bills for services rendered amounting to the sum of \$302.50 and payment requested. The defendant testified on this subject: "I received statements from the plaintiff almost monthly after the work referred to was delivered; those statements were made out to me; did not send any back to plaintiff. I don't think I complained when these statements were received that they were incorrectly charged."

The question of fact in this case was a controverted one, and there is evidence which fully justified the trial court in its finding against the defendant and in entering judgment for the amount appealed from.

The defendant raises the question that at the close of the hearing the court rather intimated that he would find for the defendant and continued the cause for sometime later, when he entered this judgment. However, the court entered no finding at the time it is claimed he was convinced the defendant was not liable, and from the record no order was entered until the finding was entered in the case for the plaintiff against the defendant in the sum of \$302.50. The finding is not against the earliest receipt of the evidence, and not being so, this court is not in a position to consider the controverted questions of fact in the case. The court having passed upon them and entered judgment against the defendant, which we believe was a proper one, the judgment is affirmed.

JUDGMENT AFFIRMED.

GENIS E. SUMMIVILLE, F.J. AND HARRY J. GOSWELL.

39296

LOTTIE VERNON,

Plaintiff - Appellee,

v.

ETHEL SMALL,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

291 I.A. 613⁴

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Circuit Court of Cook County in the sum of \$4,000, entered upon a verdict in a suit in trespass on the case for personal injuries.

The declaration alleges in the first count that the defendant, Ethel Small, owned an automobile which was being driven in Massillon, Ohio, on Lincoln Way West, near the intersection of 15th street, in that city; that the plaintiff was walking on the north side of Lincoln Way West, in the exercise of due care for her safety; that the defendant negligently, carelessly and improperly, ran, used, managed and operated her automobile so that as a proximate result thereof it ran over the sidewalk at Lincoln Way West and 15th Street, on October 13, 1932, and injured the plaintiff.

The second count sets up certain provisions of the Motor Vehicle Law of Ohio, as follows:

"No person shall operate a motor vehicle in and upon the public roads and highways, at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the road or highway, and of any other conditions then existing. And no person shall drive any motor vehicle in and upon any public road or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

It shall be prima facie lawful for the operator of a motor vehicle to drive the same at a speed not exceeding the following:

Twenty miles per hour in the business or closely built up portions of a Municipal Corporation.

Thirty-five miles per hour in all other portions of a Municipal Corporation.

Forty-five miles per hour on highways, outside of Municipal Corporations.

LOTTIE VERNON,

Plaintiff - Appellee,

v.

ETHEL SMALL,

Defendant - Appellant.

Circuit Court

COOK COUNTY.

221 I.A. 613

MR. JUSTICE HANDEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in the Circuit Court of Cook County in the sum of \$4,000, entered upon a verdict in a suit in trespass on the case for personal injuries.

The declaration alleges in the first count that the defendant, Ethel Small, owned an automobile which was being driven in Cassillon, Ohio, on Lincoln Way West, near the intersection of 15th street, in that city; that the plaintiff was walking on the north side of Lincoln Way West, in the exercise of due care for her safety; that the defendant negligently, carelessly and improperly, ran, used, managed and operated her automobile so that as a proximate result thereof it ran over the plaintiff at Lincoln Way West and 15th Street, on October 13, 1922, and injured the plaintiff.

The second count sets up certain provisions of the Motor

Vehicle Law of Ohio, as follows:

"No person shall operate a motor vehicle in and upon the public roads and highways, at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface and width of the road or highway, and of any other conditions then existing. And no person shall drive any motor vehicle in and upon any public road or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

It shall be prima facie lawful for the operator of a motor vehicle to drive the same at a speed not exceeding

the following:

Twenty miles per hour in the business or closely built up portions of a Municipal Corporation.
Thirty-five miles per hour in all other portions of a Municipal Corporation.
Forty-five miles per hour on highways, outside of Municipal Corporations.

It shall be prima facie unlawful for any person to exceed any of the foregoing speed limitations."

The third count alleges a statute of the State of Ohio, purporting to read as follows:

"Vehicles shall keep to the right side of the road or highway except when necessary to turn to the left in crossing a road or highway, or in overtaking and passing another vehicle; provided that in passing a vehicle, going in the same direction, such passing shall be made as close to the right hand side of the road or highway as practicable."

From the evidence as detailed by the defendant it appears that about nine o'clock in the morning on October 13, 1932, a rainy day, Mrs. Ralph Small, of Chicago, Illinois, was driving her Chrysler automobile, on Lincoln Way West in the City of Massillon, Ohio, a town of about 28,000 people. Lincoln Way West runs east and west, and the street between the curbs at the place where the accident occurred is 32 feet wide. 15th street runs north and south. From the south it runs to Lincoln Way West and terminates at that street. It is 24 feet wide from curb to curb. 15th street is at the bottom of a hill, which starts two or three blocks west of 15th street, on Lincoln Way West, and proceeds in an easterly direction with different inclinations, but always down hill, until it reaches beyond 15th street. At some time prior to the happening of the accident there had been street car tracks down the center of Lincoln Way West, which extended down this incline. The tracks had been removed, brick had replaced the tracks, and on top of the bricks had been placed a coating of tar or asphalt which on rainy days was slippery. At the hour above mentioned Mrs. Small and her daughter, about 23 years of age, were driving down this incline at a speed which they say was about 20 to 25 miles an hour. The plaintiff, on the other hand, from the evidence appearing in the record, says that the defendant was driving from 45 to 55 miles an hour. At the time Mrs. Small was driving down this incline the mother of the plaintiff was operating an automobile which had stopped in front of a house about 100 feet east of 15th

It shall be prima facie unlawful for any person to exceed any of the foregoing speed limitations."

The third count alleges a statute of the State of Ohio,

purporting to read as follows:

"Vehicles shall keep to the right side of the road or highway except when necessary to turn to the left in crossing a road or highway, or in overtaking and passing another vehicle; provided that in passing a vehicle, in the same direction, such passing shall be made as close to the right hand side of the road or highway as practicable."

from the evidence as detailed by the defendant it appears

that about nine o'clock in the morning on October 12, 1932, a rainy

day, Mrs. Ralph Small, of Chicago, Illinois, was driving her

Chrysler automobile, on Lincoln Way west in the City of Hamilton,

Ohio, a town of about 38,000 people. Lincoln Way east runs east and

west, and the street between the corners at the place where the

accident occurred is 32 feet wide. 15th street runs north and south,

from the south it runs to Lincoln Way east and terminates at that

street. It is 32 feet wide from curb to curb. 15th street is at

the bottom of a hill, which starts two or three blocks west of 15th

street, on Lincoln Way east, and proceeds in an easterly direction with

different inclinations, but always down hill, until it reaches beyond

15th street. At some time prior to the happening of the accident

there had been street car tracks down the center of Lincoln Way east,

which extended down this incline. The tracks had been removed, brick

had replaced the tracks, and on top of the bricks had been placed a

coating of tar or asphalt which on rainy days was slippery. At the

hour above mentioned Mrs. Small and her daughter, about 25 years of

age, were driving down this incline at a speed which they say was about

20 to 25 miles an hour. The incline, on the other hand, from the

evidence appearing in the record, says that the defendant was driving

from 45 to 55 miles an hour. At the time Mrs. Small was driving down

this incline the mother of the plaintiff was operating an automobile

which had stopped in front of a house about 100 feet east of 15th

street, on the south side of Lincoln Way West. This automobile was then backed northwest on the south side of Lincoln Way West, directly toward defendant's oncoming car, which was being driven east on the south side of Lincoln Way West.

The evidence of the defendant is to the effect that apparently the purpose of backing across the street toward the house in which Lottie Vernon lived was to pick up Lottie Vernon, who had come out of the house on the north side of Lincoln Way West, a trifle west of 15th street. The plaintiff, however, claimed that at the time she was going to work; that she waited for the traffic to pass on Lincoln Way West so that she could proceed to the other side of the road to go to the garage of her sister, where she was to take an automobile to use for the purposes of her business.

The disputed facts arise at this point. There is evidence that Mrs. Smart, the mother of the plaintiff, and Mrs. Addie Epp, the sister of the plaintiff, who were in the car at the time it was being operated, testified they backed in on 15th street and were not on the highway of Lincoln Way West at the time the accident happened, and that they were on their way to the country to get milk and were to take Lottie Vernon along, but this was denied by the plaintiff.

The defendant contends that when the automobile operated by Mrs. Smart reached 15th street, or close to it, it suddenly swung around with the back toward the south and backed into 15th street. Mrs. Small, the defendant, in the meantime, had driven within about 30 feet of the point where the abrupt turn was made and when the car turned broadside to her east-bound automobile she put on the brakes in an effort to stop, at the same time turning to the left, and on account of the slippery condition of the street at the point where the tracks were formerly in the road bed, her car skidded, she lost control of the car and it ran over the sidewalk on the north side of Lincoln Way West, striking the plaintiff and causing the injuries for which

street, on the south side of Lincoln way west. His automobile was then backed northwest on the south side of Lincoln way west, directly toward defendant's oncoming car, which was being driven east on the south side of Lincoln way west.

The evidence of the defendant is to the effect that apparently the purpose of backing across the street toward the house in which Lottie Vernon lived was to pick up Lottie Vernon, who had come out of the house on the north side of Lincoln way west, a traffic east of 15th street. The plaintiff, however, claimed that at the time she was going to work; that she waited for the traffic to pass on Lincoln way west so that she could proceed to the other side of the road to go to the garage of her sister, where she was to take an automobile to use for the purpose of her business.

The disputed facts arise at this point. There is evidence that Mrs. Smart, the mother of the plaintiff, and Mrs. Addie Day, the sister of the plaintiff, who were in the car at the time it was being operated, testified they backed in on 15th street and were not on the highway of Lincoln way west at the time the accident happened, and that they were on their way to the country to get milk and were to take Lottie Vernon along, but this was denied by the plaintiff.

The defendant contends that when the automobile operated by Mrs. Smart reached 15th street, or close to it, it suddenly swung around with the back toward the south and backed into 15th street. Mrs. Smart, the defendant, in the meantime, had driven within about 30 feet of the point where the front turn was made and when the car turned proceeded to her east-bound automobile and put on the brakes in an effort to stop, at the same time turning to the left, and on account of the slippery condition of the street at the point where the tires were formerly in the road bed, her car skidded, she lost control of the car and it ran over the plaintiff on the north side of Lincoln way west, striking the plaintiff and causing the injuries for which

this suit was instituted. After plaintiff was injured she was taken to the Massillon Hospital of Massillon, Ohio, where she received first aid and remained from Thursday until the following Sunday afternoon, when she was removed to her home.

As to whether the defendant was negligent in the operation of the automobile at the time of the accident, there is evidence that while being operated by the defendant the car was running at a speed of from 45 to 55 miles an hour just prior to the accident in which the plaintiff was injured. As to the cause of the accident the evidence is controverted. It is plain that this was a question of fact for the jury, and we believe their verdict is not against the manifest weight of the evidence. The plaintiff was standing on the sidewalk, where she had a right to be, and was injured when struck by the automobile being operated by the defendant. Therefore, she is entitled to compensation for injuries received as a result of the accident.

We are obliged to comment upon the claim made by the parties to this litigation that the briefs of each of the opponents are untrue and not reliable. It is regrettable that counsel have become so impressed with their side of the case that they resort to such criticism. If it were necessary to criticise the briefs as containing untruthful statements, the proper procedure would have been to move the court to strike them. This not having been done, they stand as they are and this court will endeavor to determine the questions raised upon their merits.

The real question as we view the case is as to the allowance of damages sought to be recovered.

The defendant contends, and strenuously so, that the damages are excessive and show passion and prejudices. The theory upon which this claim is made is that there was evidence introduced to show the plaintiff was in good health at the time of the accident and had

this suit was instituted. After plaintiff was injured she was taken to the Hamilton Hospital of Hamilton, Ohio, where she received first aid and remained from Thursday until the following Sunday afternoon, when she was removed to her home.

As to whether the defendant was negligent in the operation of the automobile at the time of the accident, there is evidence that while being operated by the defendant the car was running at a speed of from 40 to 50 miles an hour just prior to the accident in which the plaintiff was injured. As to the cause of the accident the evidence is controverted. It is plain that this was a question of fact for the jury, and we believe their verdict is not against the manifest weight of the evidence. The plaintiff was standing on the sidewalk, where she had a right to be, and was injured when struck by the automobile being operated by the defendant. Therefore, she is entitled to compensation for injuries received as a result of the accident.

We are obliged to comment upon the claim made by the parties to this litigation that the briefs of each of the opponents are untrue and not reliable. It is regrettable that counsel have become so impressed with their sides of the case that they resort to such criticism. If it were necessary to criticize the briefs we contain- ing untruthful statements, the proper procedure would have been to move the court to strike them. This not having been done, they stand as they are and this court will endeavor to determine the questions raised upon their merits.

The real question as we view the case is as to the allowance of damages sought to be recovered.

The defendant contends, and strenuously so, that the damages are excessive and show passion and prejudice. The theory upon which this claim is made is that there was evidence introduced to show the plaintiff was in good health at the time of the accident and had

never suffered from any disease, when the fact is, and as urged by the defendant, she was afflicted with a social disease at the time of the accident.

The facts upon this question are that after being treated by Dr. John J. South, in the hospital to which she was removed in Massillon, Ohio, after a few days she was discharged by him as cured. The records of the hospital where she received treatment in Massillon, Ohio, show that when she received treatment in the hospital she was suffering from abrasions on the legs, lacerations of the vagina, pain in the back and neck with a final diagnosis of concussion of the brain; that there was a medical examination of her blood at the time, which showed she had a leucocyte count of 12800. The leucocyte count is one which determines whether a person has an active infection in the body, and from the evidence in the record this would indicate that the 12800 leucocyte count in the plaintiff's blood showed a definite infection in her body when she entered the hospital. The normal count of the average individual is about 10,000 to a cubic centimeter.

Dr. South, who was the staff surgeon at the hospital found the plaintiff was admitted about 9 o'clock in the morning and that she was conscious, and from an examination and the history obtained from her at the time, that she had a mild concussion, brush burns on her knees and ankles, a laceration in the perineum and some on her face. The laceration in the perineum was superficial, not deep, on the side of the vagina, about an inch and a half to two inches in extent, just through the skin. And after she had reacted sufficiently from her concussion, she was given a local anesthesia in the operating room and two or three sutures placed in it. It was cut through the skin and did not affect the underlying tissues at all. Dr. South testified:

"There were brush burns to the ankle and knee, and no sprains or injuries of that sort that we could determine. She left the

never suffered from any disease, when the fact is, and as urged by the defendant, she was afflicted with a social disease at the time of the accident.

The facts upon this question are that after being treated by Dr. John J. South, in the hospital to which she was removed in Massillon, Ohio, after a few days she was discharged by him as cured. The records of the hospital where she received treatment in Massillon, Ohio, show that when she received treatment in the hospital she was suffering from abscesses on the feet, laceration of the vagina, pain in the back and neck with a final diagnosis of contusion of the brain; that there was a radical examination of her blood at the time, which showed she had a leucocyte count of 12800. The leucocyte count is one which determines whether a person has an active infection in the body, and from the evidence in the record this would indicate that the 12800 leucocyte count in the plaintiff's blood showed a definite infection in her body when she entered the hospital. The normal count of the average individual is about 10,000 to a cubic centimeter.

Dr. South, who was the staff surgeon at the hospital found the plaintiff was admitted about 9 o'clock in the morning and that she was comatose, and from an examination and the history obtained from her at the time, that she had a mild contusion, bruise burns on her knees and ankles, a laceration in the perineum and some on her face. The laceration in the perineum was superficial, not deep, on the side of the vagina, about an inch and a half to two inches in extent, just through the skin. And after she had received antiseptically from her contusion, she was given a local anesthetic in the operating room and two or three sutures placed in it. It was cut through the skin and did not affect the underlying tissues at all. Dr. South testified: "There were bruise burns to the ankle and knee, and no lacerations or injuries of that sort that we could determine. She left the

hospital in three days. She left because I felt her recovery was sufficient and she desired to go home. She asked to go home. I saw her at her home after that. When I sewed up this cut in the perineum I observed that she had a mucous and pus, like mucous from a cold and pus from boils. That was from the vagina and had no relation to the cut on the perineum. I saw her twice at her home. There was nothing to be done for her at the time. She was suffering from nervous reaction and was advised to rest. I saw her at my office later on when she came, and finally discharged her as cured."

Sometime after the accident the plaintiff was treated by Dr. John Van Dyke of Canton, Ohio, which was about February 24, 1933. At that time he treated the plaintiff for her condition, and after treatment for sometime the doctor reached the conclusion that it was necessary to operate and the operation was had on August 11, 1933. From the doctor's evidence it was necessary to put the plaintiff under an anesthetic and dilate the cervix, in order to curet or scrape the uterus. Following this he made what he testified to as a mid line incision in the abdomen and examined the female organs. The tubes were greatly inflamed and red. There were engorgements of the veins leading to these parts. The uterus was tipped back in a very backward position. The appendix was short and kinked and showed a few adhesions. It showed that in some time past there had been inflammation about it. The doctor removed both fallopian tubes and took out the appendix. Then he cut the ligaments which held the womb and pulled the womb toward the middle line and fastened the broad ligaments to the womb. Then he closed the abdomen and she was discharged on August 25, 1933. The plaintiff does not seek to recover for the condition and removal of the appendix.

It appears from Dr. Van Dyke's testimony while on the witness stand that at the time he first examined the plaintiff she was afflicted with gonorrhea, and the purpose of the operation was

hospital in three days. The last because I felt her recovery was efficient and she decided to go home. She asked to go home. I saw her at her home after that. When I ceased to visit in the perineum I observed that she had a mucous discharge, like mucus from a cold and from boils. That was from the vagina and had no relation to the cut on the perineum. I saw her again at her home. There was nothing to be done for her at the time. She was suffering from nervous reaction and was advised to rest. I saw her at my office later on when she came, and the lady said "my husband was called." Sometimes after the accident the lady was treated by Dr. John Van Dyke of Canton, Ohio, which was about February 14, 1935. At that time he treated the plaintiff for her condition, and after treatment for sometime the doctor reached the conclusion that it was necessary to operate and the operation was had on August 11, 1935. From the doctor's evidence it was necessary to do the plaintiff under an anesthetic and dilate the cervix, in order to extract or scrape the uterus. Following this he made an incision into the abdominal wall and incision in the abdomen and examined the female organs. The tubes were greatly inflamed and red. There were enlargements of the veins leading to these parts. The uterus was tipped back in a very backward position. The appendix was short and thick and showed a few adhesions. It showed that in some time ago there had been inflammation about it. The doctor removed both fallopian tubes and took out the appendix. Then he cut the ligaments which held the womb and pulled the womb toward the middle line and fastened the broad ligaments to the womb. Then he closed the abdomen and she was discharged on August 15, 1935. The plaintiff has not been to recover for the condition and removal of the appendix.

It appears from Dr. Van Dyke's testimony while on the witness stand that at the time he first examined the plaintiff she was afflicted with gonorrhea, and the purpose of the operation was

to remedy the effects of this disease. He was corroborated in this statement by a smear which was taken and analyzed by Dr. Fuhs, a pathologist of the hospital, and from his examination of the material taken from the plaintiff's organs, she was afflicted with the disease testified to by Dr. Van Dyke. We do not deem it necessary to go into the details of the medical examination and the testimony of the doctors upon this subject. The fact is that Dr. Van Dyke, the physician who performed plaintiff's operation, testified that she was afflicted with this venereal disease, and that the germ of this disease was dormant and because of the accident became active and brought about the condition described by the doctors.

The plaintiff, however, testified and maintained by her testimony that she was in good health and that she never was afflicted with this venereal disease, and her theory in presenting this matter of good health is not supported by the evidence of her condition as described by the doctors. While we have stated at the outset of this opinion that she is entitled to damages brought about by the operation of the automobile, still in view of the condition of the record we are not prepared to say that the plaintiff should recover the amount of the verdict of the jury. She testified and maintained that she had been in good health and was so at the time of the accident, when as a matter of fact, as developed from the evidence, she was afflicted with the disease pointed out.

The judgment is reversed and the cause is remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

to remedy the effects of this disease. He was corroborated in this statement by a master which was taken and analyzed by Dr. Jones, a pathologist of the hospital, and from his examination of the material taken from the plaintiff's organs, she was afflicted with the disease testified to by Dr. Van Dyke. We do not deem it necessary to go into the details of the medical examination and the testimony of the doctors upon this subject. The fact is that Dr. Van Dyke, the physician who performed plaintiff's operation, testified that she was afflicted with this venereal disease, and that the form of this disease was dormant and because of the accident became active and brought about the condition described by the doctors.

The plaintiff, however, testified and maintained by her testimony that she was in good health and that she never was afflicted with this venereal disease, and her theory in presenting this matter of good health is not supported by the evidence of her condition as described by the doctors. While we have stated at the outset of this opinion that she is entitled to damages brought about by the operation of the automobile, still in view of the condition of the record we are not prepared to say that the plaintiff should recover the amount of the verdict of the jury. We testified and maintained that she had been in good health and was so at the time of the accident, when as a matter of fact, as developed from the evidence, she was afflicted with the disease pointed out.

The judgment is reversed and the case is remanded for another trial.

REVEREND THE HONORABLE

DAVID B. BRIDGES, JUDGE OF THE COURT.

39470

FANNY SERIO, Administratrix of the Estate
of LOUIS PISTILLI, Deceased, Plaintiff
below,

(Petitioner) Appellant,

v.

MORRIS SLIFKIN and SAM SLIFKIN, Defendants
below,

MORRIS SLIFKIN,

(Respondent) Appellee.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

291 I.A. 614¹

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff, administratrix, from an order entered by the court granting defendant's motion for a new trial. Upon a trial before a jury, a verdict was returned for the plaintiff in the sum of \$10,000.

This action is founded upon a complaint filed March 7, 1934, consisting of two counts. Count No. 1 alleges the appointment of Fannie Serio as administratrix of the estate of Louis Pistilli, deceased; that the defendants, Morris and Sam Slifkin operated and drove their automobile on January 13, 1934, north on Homan Avenue near Arthington Street in the City of Chicago; that it was the duty of the defendants to use ordinary care, and that the plaintiff, using ordinary care for his own safety, was walking west on Homan Avenue on the crosswalk at Arthington Street; that the defendants negligently drove their automobile so that it struck Louis Pistilli and killed him.

Count No. 1 further alleges that the defendants were driving at an excessive rate of speed in violation of the Statutes of the State of Illinois, Ch. 95a, Section 23; that the defendants drove their automobile without good and sufficient brakes contrary to the statute, and without a suitable horn contrary to the statute; that by reason of the injuries sustained by Louis Pistilli he died. Petitioner prays for judgment for \$10,000.

39470

FAMILY BERTIO, Administratrix of the estate
of LOUIS BERTIO, deceased, Plaintiff
below,

(Petitioner) Appellant,

MORRIS BILKIN and SAM BILKIN, Defendants
below,

MORRIS BILKIN,

(Respondent) Appellee.

211 A. 614

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Plaintiff, Administratrix, from an order entered by the court granting defendant's motion for a new trial. Upon a trial before a jury, a verdict was returned for the plaintiff in the sum of \$10,000.

This action is founded upon a complaint filed March 7, 1934, consisting of two counts. Count No. 1 alleges the appointment of Annie Bertio as administratrix of the estate of Louis Bertio, deceased; that the defendants, Morris and Sam Bilkín operated and drove their automobile on January 17, 1934, north on Hogan Avenue near Arlington Street in the City of Chicago; that it was the duty of the defendants to use ordinary care, and that the Plaintiff, using ordinary care for his own safety, was walking west on Hogan Avenue on the crosswalk at Arlington Street; that the defendants negligently drove their automobile so that it struck Louis Bertio and killed him.

Count No. 2 further alleges that the defendants were driving at an excessive rate of speed in violation of the Statute of the State of Illinois, Ch. 93a, Section 27; that the defendants drove their automobile without good and sufficient brakes contrary to the statute, and without a suitable horn contrary to the statute; that by reason of the injuries sustained by Louis Bertio he died. Petitioner prays for judgment for \$10,000.

Count No. 2 of the complaint contains the same allegations as are alleged in Count No. 1, except that it alleges the defendants drove their automobile in such a wantonly, careless manner as to amount to malicious, willful and wanton conduct.

To this complaint, the defendants, on March 9, 1935, filed their answer denying each of the allegations of the complaint and setting forth the negligence of the plaintiff as the proximate cause of the accident.

Thereafter, on October 13, 1936, the defendants moved to strike the complaint for the following reasons: (a) No allegation of "next of kin"; (b) no allegation next of kin were using due care; and (c) no allegation of pecuniary loss. On this date the court entered an order granting plaintiff leave to amend the complaint instantler on its face to show next of kin of the deceased and that they were pecuniarily injured by the wrongful death, to which was filed an additional answer by the defendants that the cause of action occurred more than one year before the filing of the amendment.

The following day, October 14, 1936, the court entered an order dismissing Sam Slifkin as party defendant, and on January 4, 1937, the court entered an order granting a new trial on the ground that Section 46 of the Civil Practice Act of 1933, does not give power to the court to amend a complaint under the Injuries Act for wrongful death, where the original complaint failed to set out who were "next of kin" and their pecuniary loss.

From the record it does not appear that an amendment was filed by the plaintiff, for which leave was granted. The complaint filed in this case does not state a cause of action for the reason that the statute in such actions provides that it is necessary to allege that the deceased left him surviving a widow and next of kin who suffered a pecuniary loss. The ground upon which an action of this kind can be maintained is provided for in ch. 70, secs. "

Count No. 2 of the complaint contains the same allegations as are alleged in Count No. 1, except that it alleges the defendants drove their automobile in such a wantonly, careless manner as to amount to malicious, willful and wanton conduct.

To this complaint, the defendants, on March 9, 1936, filed their answer denying each of the allegations of the complaint and setting forth the negligence of the plaintiff as the proximate cause of the accident.

Thereafter, on October 13, 1936, the defendants moved to strike the complaint for the following reasons: (a) no allegation of "next of kin"; (b) no allegation next of kin were named; and (c) no allegation of pecuniary loss. On this date the court entered an order granting plaintiff leave to amend the complaint instant on its face to show next of kin of the deceased and that they were pecuniarily injured by the wrongful death, to which was filed an additional answer by the defendants that the cause of action occurred more than one year before the filing of the complaint.

The following day, October 14, 1936, the court entered an order dismissing Sam Griffin as party defendant, and on January 1937, the court entered an order granting a new trial on the ground that Section 46 of the Civil Practices Act of 1937, does not give power to the court to amend a complaint under the Infants Act for wrongful death, where the original complaint failed to set out who were "next of kin" and their pecuniary loss.

From the record it does not appear that an amendment was filed by the plaintiff, for which leave was granted. The complaint filed in this case does not state a cause of action for the reason that the statute in such actions provides that it is necessary to allege that the deceased left his surviving widow and next of kin who suffered a pecuniary loss. The ground upon which an action of this kind can be maintained is provided for in Ch. 70, sec. 1.

2 of an act entitled, "Injuries to the Person". Section 1 provides:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Section 2 of this act provides:

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law. In relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of \$10,000: Provided, that every such action shall be commenced within one year after the death of such person."

It is to be noted from the complaint filed in this action that it does not appear that the deceased left him surviving a widow or next of kin who sustained pecuniary loss as a result of his death. No amendment having been filed by the plaintiff alleging the facts as suggested, the complaint does not state a cause of action, and the trial court in granting a new trial should have entered an order finding the defendant not guilty.

One of the points made in the petition for leave to appeal is that under section 46 of the Civil Practice Act, Ill. State Bar Stats. 1935, ch. 110, where the original complaint fails to set out who were the next of kin, an amendment to the pleadings is allowed.

However, the Appellate Court in the case of Friend v. Alton R. Co., 283 Ill. App. 366, upon a like question said:

"The Injuries Act of 1853 gave a new cause of action when the injury resulted in death. In cases where the injury resulted in death the common law action was abated, but under the Act of 1853, the right of action was continued in the name of the legal representatives of the deceased for the benefit of the widow and next of kin. This continued action is a new

2 of an act entitled, "Injuries to the Person". Section 1 provides:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Section 2 of this act provides:

"Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law. In relation to the distribution of personal property left by persons dying intestate, in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of \$10,000: Provided, that every such action shall be commenced within one year after the death of such person."

It is to be noted from the complaint filed in this action that it does not appear that the deceased left any surviving widow or next of kin who sustained pecuniary loss as a result of his death. No amendment having been filed by the plaintiff alleging the facts as alleged, the complaint does not state a cause of action, and the trial court in granting a new trial should have entered an order finding the defendant not guilty.

One of the points made in the petition for leave to appeal is that under section 2 of the Civil Practice Act, Ill. Stats. Supp. 1935, ch. 110, where the original complaint fails to set out who were the next of kin, an amendment to the pleading is allowed. However, the Appellate Court in the case of Tracy v. Wilson

100 Ill. App. 2d 333, upon a like question said:

"The injuries set out in the complaint were a new cause of action when the injury resulted in death. In cases where the injury resulted in death the common law action was ousted, but under the act of 1927, the right of action was continued in the name of the legal representatives of the deceased for the benefit of the widow and next of kin. This continued action is a new

suit unknown to the common law and is purely statutory. Wilcox v. Bierd, 330 Ill. 571. The act, having created new liabilities and rights unknown to the common law, conferred jurisdiction which can be exercised only in the manner and within the limitations prescribed by the statute and the plaintiff must bring himself within the conditions of the act. Welch v. City of Chicago, 323 Ill. 498; Bishop v. Chicago Rys. Co. 303 Ill. 273.

The action must be brought by and in the name of the personal representative of the deceased and shall be commenced within one year after the death of such person. The period of one year is not a statute of limitations but is a condition of the liability itself.

We are of the opinion that section 46 (2) of the Civil Practice Act has no application to actions when the period of time within which a suit shall be commenced is a condition of the liability itself and the person authorized fails to bring the action within the time limited, but after the lapse of the period such personal representative is substituted by amendment as party plaintiff in a suit commenced by persons not authorized to sue by the statute creating the liability.

The bringing of the suit in the name of the personal representative of deceased, and the commencement of the suit within one year after the death of such person by his personal representative are conditions precedent to the right to recover damages under the Injuries Act for injuries resulting in the death of a person caused by the wrongful act of another."

This decision applies to the instant case. When the complaint was filed it was not stated therein that there was a widow or next of kin surviving at the date of death of Louis Pistilli, and even if the plaintiff had filed an amendment showing a widow or next of kin it would appear from the date that leave to amend was granted more than one year after the date of death of Louis Pistilli on January 13, 1934.

For the reasons stated this court will enter an order, which should have been entered by the trial court, finding the defendant not guilty, and reversing the order of the trial court granting a new trial.

ORDER FOR NEW TRIAL REVERSED AND
JUDGMENT HERE FOR DEFENDANT.

DENIS E. SULLIVAN, P.J. AND HALL, J. CONCUR.

and unknown to the common law and is purely statutory.
Illinois v. City of Chicago, 330 Ill. 571. The act, having created
 new liabilities and rights unknown to the common law,
 conferred jurisdiction which can be exercised only in the
 manner and within the limitations prescribed by the statute
 and the plaintiff must bring himself within the conditions
 of the act. Illinois v. City of Chicago, 330 Ill. 571, 48 S.W.2d 111.

The action must be brought by and in the name of
 the personal representative of the deceased and shall be
 commenced within one year after the death of such person.
 The period of one year is not a statute of limitations but
 is a condition of the liability itself.

We are of the opinion that section 45 (2) of the Civil
 Practice Act has no application to actions when the period of
 time within which a suit shall be commenced is a condition of
 the liability itself and the person authorized to sue to bring
 the action within the time limited, but that the latter of
 the period when a personal representative is substituted by
 amendment as party plaintiff is a suit commenced by persons
 not authorized to sue by the statute creating the liability.

The bringing of the suit in the name of the personal
 representative of deceased, and the appointment of the suit
 within one year after the death of such person by his personal
 representative are conditions precedent to the right to recover
 damages under the act for injuries resulting in the
 death of a person caused by the wrongful act of another."

This decision applies to the instant case. When the

complaint was filed it was not at issue therein that there was a widow
 or next of kin surviving at the date of death of Louis Kastill, and
 even if the plaintiff had filed an amendment showing a widow or next
 of kin it would appear from the date that leave to amend was granted
 more than one year after the date of death of Louis Kastill on

January 13, 1934.

For the reasons stated this court will enter an order,

which should have been entered by the trial court, finding the
 defendant not guilty, and reversing the order of the trial court
 granting a new trial.

ORDER FOR THE TRIAL COURT AND
 JUDGMENT FOR THE DEFENDANT.

WILLIS E. DUNN, J. CLERK OF COURT.

39025

FRANK MICK, JR., for the use of TAYLOR
WASHING MACHINE COMPANY, a corporation,

Appellee,

v.

DIAMOND T MOTOR COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

291 I.A. 614²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against it entered in the Municipal Court of Chicago for the sum of \$20.40. The trial was by the court without a jury.

At the trial, it was stipulated that on January 31st, 1936, the defendant, Diamond T. Motor Company, received notice of an assignment of wages by Frank Mick, Jr., to Taylor Washing Machine Company, and that on that date, there was exhibited to the defendant the original wage assignment signed by Frank Mick, Jr., which wage assignment was dated December 17th, 1935. The original wage assignment was received in evidence, and is in words and figures as follows:

"Wage Assignment

Date December 17, 1935.

In consideration of merchandise purchased by the undersigned from the Taylor Washing Machine Co. under the above date in the sum of \$99.50, I do hereby sell, transfer, assign and set over to the said Taylor Washing Machine Co., its successors or assigns, 25 per cent of all wage or claims for wages and 100 per cent of all salary or commissions earned or to be earned, and 100 per cent of all claims or demands due or to become due me from Diamond T. Motor Company, a corporation, their successors, heirs or assigns.

Payments are \$5.00 due on the 3rd day of each month.

(Signed) Frank Mick, Jr."

At the time ^{of} the receipt of this notice Mick was in the employ of defendant,

It is defendant's theory of the case that inasmuch as

FRANK WICK, JR., for the use of LAYMAN
WASHINGTON MACHINE COMPANY, a corporation,

Appellee,

v.

DIAMOND T. MOTOR COMPANY, a corporation,

Appellant.

MUNICIPAL COURT

OF CHICAGO.

221 I.A. 614

MR. JUSTICE RAIN, LIVING THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment

against it entered in the Municipal Court of Chicago for the sum of

\$30.40. The trial was by the court without a jury.

At the trial, it was stipulated that on January 1st, 1935,

the defendant, Diamond T. Motor Company, received notice of an

assignment of wages by Frank Wick, Jr., to Taylor Washing Machine

Company, and that on that date, there was exhibited to the defendant

the original wage assignment signed by Frank Wick, Jr., which was

assignment was dated December 17th, 1934. The original wage

assignment was received in evidence, and is in words and figures

as follows:

"Wage Assignment

Date December 17, 1934.

In consideration of merchandise purchased by me under-
signed from the Taylor Washing Machine Co. under the above
date in the sum of \$35.50, I do hereby assign, transfer, assign
and set over to the said Taylor Washing Machine Co., its
successors or assigns, 25 per cent of all wages or claims for
wages and 100 per cent of all salary or commission earned
or to be earned, and 100 per cent of all claims or demands due
or to become due me from Diamond T. Motor Company, a corporation,
their successors, heirs or assigns.

Payments are \$5.00 due on the 3rd day of each month.

(Signed) Frank Wick, Jr.

of

At the time the receipt of this notice Wick was in the employ of

defendant.

It is defendant's theory of the case that inasmuch as

Frank Mick, Jr., was discharged by it on February 7th, 1936, that this discharge terminated Mick's then existing contract of employment between Mick and the defendant, that the termination of the existing contract of employment destroyed the security of the wage assignment, and that even though defendant rehired Mick on February 17th, 1936, that this rehiring initiated a new contract of employment, and that the rehiring did not revive the wage assignment previously destroyed as security by his discharge on February 7th, 1936. Defendant, however, admits that it owes the amount of \$6.75, which sum had accumulated on account of Mick's salary prior to his discharge.

It is the theory of plaintiff that Mick remained in the employment of the defendant company up to and including February 24th, 1936, the date when the suit was brought against defendant, and that the record shows that Mick earned for the period from February 17th, 1936, to February 28th, 1936, the sum of \$54.16, of which plaintiff was entitled to 25% of the portion earned between February 17th, 1936, and February 24th, 1936.

Sidney A. Cook, vice president of the defendant company, was called as a witness by plaintiff under Section 60 of the Practice Act, and testified, in substance, that Frank Mick, Jr., earned while in the employ of the defendant company from January 31st, 1936, up to and including February 24th, 1936, the sum of \$55.00; that for the week ending February 7th, 1936, he earned the sum of \$27.50, and that on February 7th, 1936, he was paid the sum of \$20.75, the company retaining \$6.75; that after the receipt by the defendant of the notice of assignment on January 31st, 1936, the witness called up the attorneys for the defendant company, and was advised that he should discharge Mick and then rehire him; that on February 7th, 1936, the witness discharged Mick, and that at the time he discharged him, it was his intention to rehire him; that on February 17th, 1936, a check was given by defendant to Mick for the sum of \$27.50, and that on that

Frank Nick, Jr., was discharged by it on February 7th, 1936, that this discharge terminated Nick's then existing contract of employment between Nick and the defendant, that the termination of the existing contract of employment destroyed the security of the same assignment, and that even though defendant retained Nick on February 17th, 1936, that this retaining initiated a new contract of employment, and that the retaining did not revive the same assignment previously destroyed as security by his discharge on February 7th, 1936. Defendant, however, admits that it owes the amount of \$7.50, which was not accumulated on account of Nick's salary prior to his discharge. It is the theory of plaintiff that Nick remained in the

employment of the defendant company up to and including February 7th, 1936, the date when the suit was brought against defendant, and that the record shows that Nick earned for the period from February 17th, 1936, to February 28th, 1936, the sum of \$4.16, of which plaintiff was entitled to 75% of the portion earned between February 17th, 1936, and February 28th, 1936.

Sidney A. Cook, vice president of the defendant company, was called as a witness by plaintiff under Section 50 of the practice act, and testified, in substance, that Frank Nick, Jr., earned while in the employ of the defendant company from January 1st, 1936, up to and including February 28th, 1936, the sum of \$11.60; that for the week ending February 7th, 1936, he earned the sum of \$7.50, and that on February 7th, 1936, he was paid the sum of \$5.75, the company retaining \$1.75; that after the receipt by the defendant of the notice of assignment on January 31st, 1936, the witness called up the attorneys for the defendant company, and was advised that he should discharge Nick and then retain him; that on February 7th, 1936, the witness discharged Nick, and that at the time he discharged him, it was his intention to require him; that on February 17th, 1936, a check was given by defendant to Nick for the sum of \$7.50, and that on that

date Mick returned to work; that on February 28th, 1936, a check was given to Mick by the defendant company for the sum of \$54.16 for his earnings from February 17th to February 28th, 1936; that the check dated February 17th, 1936, for the sum of \$27.50 was a loan by the defendant to Mick, and that no part of the loan has been paid, and that nothing was deducted out of his earnings on February 28th, 1936, for and on account of the loan.

From the whole record, we conclude that the defendant's action toward Mick in connection with this transaction and its claim that he was discharged and rehired, was a subterfuge, and an effort to defeat plaintiff's claim. The record indicates that Mick received pay for the time during which the witness Cook says he was not in the employ of the defendant company. True, Cook says the money Mick received for this period was merely a loan, but he admits that the loan was never paid, and there is no evidence that demand had ever been made for its payment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

DENIS E. SULLIVAN, P.J. AND HEBEL, J. CONCUR.

date Mick returned to work; that on February 28th, 1936, a check was given to Mick by the defendant company for the sum of \$24.16 for his earnings from February 17th to February 28th, 1936; that the check dated February 17th, 1936, for the sum of \$27.50 was a loan by the defendant to Mick, and that no part of the loan has been paid, and that nothing was deducted out of his earnings on February 28th, 1936, for and on account of the loan.

From the whole record, we conclude that the defendant's action toward Mick in connection with this transaction and its claim that he was discharged and rehired, was a subterfuge, and an effort to defeat Plaintiff's claim. The record indicates that Mick received pay for the time during which the witness Good says he was not in the employ of the defendant company. True, Good says the money Mick received for this period was merely a loan, but he admits that the loan was never paid, and there is no evidence that loan had ever been made for its payment.

The judgment of the Municipal Court is affirmed.

APPROVED.

EDWIN L. SULLIVAN, P.L. AND HENRY J. CONNOR.

39543

SAMUEL ROTHBLUM,
Appellant,

vs.

ARTHUR ALVIN GELATT and
MRS. ARTHUR ALVIN GELATT,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

291 I.A. 614²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants to recover damages for personal injuries claimed to have been sustained by him on account of defendants' negligence in driving an automobile which collided with one driven by plaintiff. There was a verdict for defendants and plaintiff appeals.

At a former trial of the case there was a directed verdict for defendants at the close of plaintiff's evidence. On appeal to this court that judgment was reversed, because we held the questions were for the jury. Rothblum v. Gelatt, 282 Ill. App. 640 (abst.)

The record discloses that about 6:30 o'clock on the evening of December 12, 1933, plaintiff was driving his Chevrolet coupe south in Leif Ericson Drive (sometimes referred to as the Outer Drive) and when he reached a point near what would be Thirty-second street if it extended east, his automobile stopped and he was unable to start it. He got out of his car, went around to the rear to see if he was out of gas and found there was plenty of gas and that the rear red light was burning. There were four or five lanes for southbound traffic and a similar number for northbound traffic. A white painted line on the pavement divided north and south bound lanes. No streets intersect the Outer Drive which runs along the shore of Lake Michigan between 31st and 39th streets, and there are no traffic lights between those points. It was dark and the pavement was dry and in good condition. The traffic was heavy.

Plaintiff called or signalled to those passing him to the west

Appellant, SAMUEL ROBINSON

vs.

Appellees, MRS. ARTHUR ALVIN GELATT and ARTHUR ALVIN GELATT

STATE OF NEW YORK
COURT OF APPEALS

1914

MR. PRESIDENT JUSTICE OF THE COURT
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover damages for personal injuries claimed to have been sustained by him on account of defendant's negligence in driving an automobile which collided with one driven by plaintiff. There was a verdict for defendant and plaintiff appeals.

At a former trial of the case there was a directed verdict for defendant at the close of plaintiff's evidence. On appeal to this court that judgment was reversed, because we held the questions were for the jury. Robinson v. Gelatt, 223 Ill. App. 640 (1927).

The record discloses that about 6:30 o'clock on the evening of December 12, 1933, plaintiff was driving his Chevrolet coupe south in West Madison Drive (roadway referred to as the Outer Drive) and when he reached a point he would be thirty-second street in its extended east, his automobile stopped and he was unable to start it. He got out of his car, went around to the rear to see if he was out of gas and found there was plenty of gas and that the rear red light was burning. There were four or five lanes for southbound traffic and a station number for northbound traffic. A white painted line on the pavement divided north and south lanes. He started in front of the Outer Drive which runs along the shore of Lake Michigan between 31st and 32nd streets, and there are no traffic lights between those points. It was dark and the pavement was dry and in good condition. The traffic was heavy. Plaintiff called or signalled to those passing him to the west

for assistance. Mr. and Mrs. Anderson, driving south at the time, came to plaintiff's assistance. As plaintiff was getting into his car it was struck in the rear by an automobile belonging to defendant Mr. Gelatt and driven at the time by defendant Mrs. Gelatt. As a result of the collision plaintiff claimed he was injured. Two men and defendants' 13 year old child were in defendants' automobile at the time; one of the men was sitting beside Mrs. Gelatt and the other man and the child were in the rear seat.

The evidence tends to show that the automobiles in the street at the time were traveling at a fair speed; Mrs. Gelatt testified that she was driving at about thirty to thirty-five miles an hour; that she saw the rear red light on plaintiff's car when she was about 100 feet from it but thought the car was moving and did not know that it was stopped until she was about thirty to thirty-five feet from it; that when she discovered the car was standing she turned toward the left to pass plaintiff's car but was prevented from doing so by the northbound traffic; that she then swung toward the west, applied the brake and the emergency brake but could not stop the car before it struck plaintiff's automobile. There is further evidence to the effect that after the collision plaintiff got out of his car, took the names of the persons in defendants' car and the owner of it, and Mrs. Gelatt drove on south, leaving the two men at their respective homes; that she then proceeded home with her child; that after she left Mr. and Mrs. Anderson turned their car around, gave plaintiff's car a push, and he was then able to start the engine and drove to his home, which was near 80th street on the south side, a distance of some three or four miles; that after plaintiff got home he called a doctor who examined him and found some injuries, applied some tape to plaintiff's body and performed other professional services at that time. The next day plaintiff, who was a lawyer and a court reporter, came

for assistance. Mr. and Mrs. Anderson, driving south at the time, came to plaintiff's assistance. As plaintiff was getting into his car it was struck in the rear by an automobile belonging to defendant and Mr. Gelatt and him on at the time by defendant Mrs. Gelatt. As a result of the collision plaintiff claimed he was injured. Two men and defendant's 13 year old child were in defendant's automobile at the time; one of the men was sitting beside Mrs. Gelatt and the other man and the child were in the rear seat.

The evidence tends to show that the automobile in the street at the time were traveling at a fair speed; Mrs. Gelatt testified that she was driving at about thirty to thirty-five miles an hour; that she saw the rear red light on plaintiff's car when she was about 100 feet from it but thought the car was moving and did not know that it was stopped until she was about thirty to thirty-five feet from it; that when she discovered the car was standing she turned toward the left to pass plaintiff's car but was prevented from doing so by the northbound traffic; that she then swung toward the west, applied the brake and the emergency brake but could not stop the car before it struck plaintiff's automobile. There is further evidence to the effect that after the collision plaintiff got out of his car, took the names of the persons in defendant's car and the owner of it, and Mrs. Gelatt drove on south, leaving the two men at their respective homes; that the men proceeded home with her child; that after she left Mr. and Mrs. Anderson turned their car around, gave plaintiff's car a push, and he was then able to start the engine and drive to his home, which was near 5000 street on the south side, a distance of some three or four miles; that after plaintiff got home he called a doctor who examined him and found some injuries, applied some tape to plaintiff's body and performed other professional services at that time. The next day plaintiff, who was a lawyer and a court reporter, came

down town and performed some, if not all, of the ordinary duties of his business of court reporting and continued to do so every day thereafter, but was not able to work all the time. Later another doctor rendered some professional services to plaintiff and in April, 1934, the physician discovered that defendant was suffering from a bilateral inguinal hernia, and there was some evidence to the effect that plaintiff's condition in this respect could have been caused by the collision of the automobiles.

Mrs. Gelatt and the two men who were riding with her in the car at the time gave testimony to the effect that just prior to the collision, when Mrs. Gelatt discovered plaintiff's car was standing still, another southbound automobile was standing a few feet west of plaintiff's automobile, while witnesses testified in plaintiff's behalf that there was no car standing near plaintiff's car at the time; that Anderson's car stopped a little south of plaintiff's standing car but on the west lane of the pavement.

The complaint was in 15 counts. There were separate counts against each defendant and also joint counts. Defendants filed a joint answer denying all ground of liability. Some time after the mandate of this court was filed with the clerk of the Circuit court, defendants, by leave of court, filed their amended answer, which was identical with their original answer except there was an additional averment by Mr. Gelatt denying that his automobile was being operated or controlled by him or by Mrs. Gelatt as his agent, and denying that he was present at the time of the collision.

Plaintiff contends that since his automobile had a red tail light burning which was visible for a distance of 100 feet, Mrs. Gelatt could have passed his car and avoided the collision by the exercise of ordinary care, that it was negligence for her

down town and performed some, if not all, of the ordinary duties of his business of court reporting and continued to do so every day thereafter, but was not able to work all the time. Later another doctor rendered some professional services to plaintiff and in April, 1934, the physician discovered that defendant was suffering from a bilateral inguinal hernia, and there was some evidence to the effect that plaintiff's condition in this respect could have been caused by the collision of the automobiles.

Mrs. Gelatt and the two men who were riding with her in the car at the time gave testimony to the effect that just prior to the collision, when Mrs. Gelatt discovered plaintiff's car was standing still, another automobile was standing a few feet west of plaintiff's automobile, while witnesses testified in plaintiff's behalf that there was no car standing near plaintiff's car at the time; that Anderson's car occupied a little south of plaintiff's car but on the west side of the pavement.

The complaint was in its nature, there were separate counts against each defendant and also joint counts. Defendants filed a joint answer denying all grounds of liability. Some time after the making of this count was filed with the clerk of the Circuit Court, defendant, by leave of court, filed their amended answer, which was identical with their original answer except there was an additional averment by Mrs. Gelatt denying that his automobile was being operated or controlled by him or by Mrs. Gelatt as his agent, and denying that he was present at the time of the collision.

Plaintiff contends that since his automobile had a red tail light burning which was visible for a distance of 100 feet, Mrs. Gelatt could have passed his car and avoided the collision by the exercise of ordinary care, that it was negligence for her

not to do so, and further that, "It is negligence as a matter of law to drive an automobile at such speed that it cannot be stopped in time to avoid a collision with an object discernible within the driver's clear range of vision ahead." We think these questions were for the jury, under all the circumstances as disclosed by the evidence. There is evidence to the effect that Mrs. Gelatt tried to avoid the collision by turning to the left and then to the right, but on account of the traffic she was unable to do so. And the jury apparently took this view of the matter. In Moyer v. Vaughn's Seed Store, 242 Ill. App. 308, we held that the question of negligence was one of fact under all the circumstances, where an automobile was being driven along a public highway in the dark at such speed that it could not be stopped within the distance of the driver's vision. If the law is as plaintiff contends, traffic would be blocked on all streets such as the one in question. It is common knowledge that on all streets and boulevards where traffic is heavy, automobiles are nearly always necessarily so close together that they could not be stopped in time to avoid collision in case anything went wrong with the car or with any of the cars ahead. Furthermore, the rule contended for by plaintiff is contrary to the statute; chap. 121, par. 336 Ill. State Bar Stats. 1935. That paragraph provides: "The driver of a motor vehicle shall not follow any vehicle more closely than is reasonably prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

Plaintiff further contends that whether Mrs. Gelatt was guilty of wanton misconduct was a question of fact for the jury, and that the court erred in striking the wanton counts. There is no evidence of such misconduct and the court did not err in striking such counts from the complaint.

not to do so, and further that, "It is negligence as a matter of law to drive an automobile at such speed that it cannot be stopped in time to avoid a collision with an object discernible within the driver's clear range of vision ahead." We think these questions were for the jury, under all the circumstances as disclosed by the evidence. There is evidence to the effect that Mrs. Gelfelt tried to avoid the collision by turning to the left and then to the right, but on account of the traffic she was unable to do so. And the jury apparently took this view of the matter. In Moyer v. Van Dine's Seed Store, 243 Ill. App. 308, we held that the question of negligence was one of fact under all the circumstances, where an automobile was being driven along a public highway in the dark at such speed that it could not be stopped within the distance of the driver's vision. If the law is as plaintiff contends, traffic would be blocked on all streets such as he and in question. It is common knowledge that on all streets and highways where traffic is heavy, automobiles are nearly always necessarily so close together that they could not be stopped in time to avoid collision in case they went wrong with the car or hit any of the cars ahead. But there, the rule contained in plaintiff's complaint is contrary to the statute; chap. 181, par. 306 Ill. State Stat. 1933. That paragraph provides: "The driver of a motor vehicle shall not follow any vehicle more closely than is reasonably prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

Plaintiff further contends that whether Mrs. Gelfelt was guilty of wrong misconduct was a question of fact for the jury, and that the court erred in striking the wrong counts. There is no evidence of such misconduct and the court did not err in striking such counts from the complaint.

Plaintiff further contends that the court erred in refusing an instruction requested by him. By this refused instruction plaintiff sought to have the jury told that if they believed from the evidence that Mrs. Gelatt was driving the automobile at the time in question, "pursuant to the acts, statements and declarations of her husband," that the husband would be bound by her acts and would be liable for her negligence, if any, although he was not present at the time. At the conclusion of the evidence the parties went into chambers with the court and thereupon defendant Mr. Gelatt withdrew that part of the amended answer which denied that he was operating or controlling the car either himself or by his agent. It is the law that if Mrs. Gelatt was driving the automobile for her husband, he would be liable for any damage occasioned by her negligence, but we think the instruction is not clear on this point. We are also of opinion that there was insufficient evidence on the question of such agency on which to base the instruction. The evidence is to the effect that Mrs. Gelatt worked at the same place at which her husband was employed; that they often drove to and from work together; that on the day in question he told her it was necessary for him to work that evening, and shortly thereafter she drove the car with their child and the two men to her home. We think the evidence fails to show that she was acting as her husband's agent. Moreover, the court gave the jury two forms of verdict, in one of which they were told to sign in case they found the defendants guilty, and to assess plaintiff's damages. We think the jury might have taken the view that Mrs. Gelatt was not guilty of any negligence - that the collision was the result of an accident - and since they did not find her guilty, obviously they could not render a verdict against her husband. But in any view of the case, we think any failure on the part of the court to instruct the jury on the question of

Plaintiff further contends that the court erred in refusing an instruction requested by him. By this refusal in-struction plaintiff sought to have the jury told that if they believed from the evidence that Mrs. Gelatt was driving the automobile at the time in question, "that as to the facts, statements and declarations of her husband," that the husband would be bound by her acts and would be liable for her negligence, if any, although he was not present at the time. As the conclusion of the evidence the parties were instructed that the court and thereupon defendant Mr. Gelatt withdrew from the jury and answered which stated that he was operating or controlling the car either himself or by his agent. It is the fact that it was Gelatt was driving the automobile for her husband, he would be liable for any negligence of her negligence, but we think the instruction is not clear on this point. We are also of opinion that there was insufficient evidence on the question of such agency on which to base the instruction. The evidence is to the effect that Mrs. Gelatt worked at the same place at which her husband was employed; that they often drove to and from work together; that on the day in question he told her it was necessary for him to work that evening, and shortly thereafter she drove the car with their child and the two men to her home. We think the evidence fails to show that she was acting as her husband's agent. Moreover, the court gave the jury two forms of verdict, in one of which they were told to sign in case they found the defendant guilty, and to answer plaintiff's damages. We think the jury might have taken the view that Mrs. Gelatt was not guilty of any negligence - that the collision was the result of an accident - and since they did not find her guilty, obviously they could not render a verdict against her husband. But in any view of the case, we think any failure on the part of the court to instruct the jury on the question of

agency would not warrant a reversal of the judgment. The facts in the case were not complicated but few and simple and easily understood by the jury. Upon the whole record we think the plaintiff was not prejudiced by refusal to give an instruction on this question.

Further complaint is made that the court erred in refusing to permit plaintiff to read the depositions of the two defendants taken by plaintiff before the trial. And counsel says he expected to show by the depositions that Mrs. Gelatt was acting at the time as Mr. Gelatt's agent, and to more fully cover the willful and wanton counts. Both defendants testified on the trial and the facts touching the agency were fully gone into. And since there was no evidence of willful misconduct on the part of Mrs. Gelatt, we are clear that plaintiff was in no way prejudiced.

It is also contended that the court excluded proper evidence offered by plaintiff and overruled plaintiff's objections to certain questions put to Dr. Draeger. The evidence claimed to have been erroneously excluded is as to the speed of the automobile, distance between the two automobiles after the collision, and as to whether a witness would have heard an automobile horn^{blown}/if this had been the fact. We think there is no merit in these contentions. All the facts were fully developed and while some of the rulings were not strictly accurate, judgments are not reversed for trivial errors.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett and McSurely, JJ., concur.

agency would not want a reversal of the judgment. The facts in the case were not complicated but the law was and easily understood by the jury. Once the whole record was laid out plaintiff was not surprised by refusal to give an instruction on this question.

Further complaint is made that the court erred in refusing to permit plaintiff to read the deposition of the two defendants taken by plaintiff before the trial. And counsel says he expected to do so by the deposition that was read and acting at the time as Dr. Gelatt's agent, and he was fully covered by willful and wanton conduct. Both defendants testified on the trial and the facts touching the agency were fully and in detail. And there was no evidence of willful misconduct on the part of Dr. Gelatt, we are clear that if injury was in no way prevented.

It is also contended that the court excluded proper evidence offered by plaintiff and overruled plaintiff's objections to certain questions put to Dr. Driscoll. The evidence claimed to have been erroneously excluded is as to the speed of the automobile, distance between the two automobiles after the collision, and as to whether a witness would have seen an automobile with all this had been the fact. A check there is no merit in the contention. All the facts were fully developed and while some of the rulings were not strictly accurate, judgments are not reversed for trivial errors.

The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Matchett and Isely, JJ., concur.

39541

B. A. RAILTON CO., a Corporation,
Appellee,

vs.

JACK KEARNS & JACK KEARNS, Inc.,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

291 I.A. 614⁴

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for goods alleged to have been sold to and accepted by defendants and not paid for; they were defaulted for failure to appear and judgment was entered against them for \$1073.13, from which Jack Kearns, Inc., a corporation, appeals.

The burden of its brief in this court is that Jack Kearns, Inc., a corporation, was never served with summons and therefore plaintiff was not entitled to judgment against it. The record shows that suit was brought against Jack Kearns individually and Jack Kearns, Inc., a corporation, as joint defendants, for merchandise sold and delivered to them; the return of the summons shows personal service upon Jack Kearns and also recites that it was served upon the corporation by leaving a copy thereof with Jack Kearns as agent of the corporation; the summons was returnable July 20, 1936, and on that date neither defendant appeared and default for want of appearance was entered against both.

As plaintiff was seeking to recover more than \$1000 it was a suit of the first class in the Municipal court, and in order to obtain judgment it was necessary for plaintiff to prove his claim by witnesses in open court. A copy of notice of intention to prove plaintiff's claim on July 23rd and to move for judgment was sent by registered mail to Jack Kearns; this letter was delivered July 22nd, and on July 23rd plaintiff appeared in court to prove its claim;

R. A. RAILLON CO., a Corporation,
Appellee,
vs.
JACK KEARNS & JACK KEARNS, Inc.,
a corporation,
Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED

IN REPLY TO PETITION FOR WRIT OF HABEAS CORPUS

Plaintiff's Petition and the facts alleged to have been said to and accepted by defendant and said for; they were detailed for failure to appear and judgment was entered against them for \$1073.15, from which Jack Kearns, Inc., a corporation, appeals. The burden of its proof is on the court in that Jack Kearns, Inc., a corporation, has never dealt with anyone and therefore plaintiff was not entitled to judgment against it. The record shows that said was brought against Jack Kearns individually and that Kearns, Inc., a corporation, as joint defendants, for damages sold and delivered to them; the record of the same shows payment service upon Jack Kearns and the record of it was served upon the corporation by having a copy thereof with Jack Kearns as agent of the corporation; the record was returned July 1, 1935, and on that date neither defendant nor plaintiff appeared in court for judgment was entered against both.

As plaintiff was seeking to recover more than \$1000 it was a suit of the first class in the Municipal Court, and in order to obtain judgment it was necessary for plaintiff to prove his claim by witnesses in open court. A copy of notice of intention to prove plaintiff's claim on July 23rd and to move for judgment was sent by registered mail to Jack Kearns; this letter was delivered July 23rd, and on July 23rd plaintiff appeared in court to prove its claim;

neither defendants appearing they were defaulted and judgment was entered against them in the sum of \$1073.13.

On the same day, July 23rd, garnishment summons was issued against the First National Bank of Chicago. Apparently the bank attempted to notify the corporation of the garnishment proceedings but the letter to this effect did not reach the corporation.

July 27th defendant Jack Kearns personally appeared in court with attorney Hyman L. Brody of the firm of Brody & Rabens, and on that date the appearance of both defendants was entered by these attorneys; on the same day a petition was presented on behalf of the defendants representing that the petitioner Jack Kearns was the defendant and that he was the agent of Jack Kearns, Inc., a corporation, the other defendant; the petition set out as ground to vacate the judgment that he was present in the court room on the day the summons was returnable but failed to hear the call of the cause.

The motion and petition were made on behalf of both defendants, alleging that they had a good and meritorious defense to the claim in that none of the merchandise for which suit was brought was received by defendants or sold to them. The court allowed this petition to stand as defendants' affidavit of merits, the judgment to stand as security, and the cause was assigned to the chief Justice of the Municipal court for reassignment.

The case was then reassigned and set for trial for August 6th; on that date, on motion by the attorneys for defendants, it was continued to September 10th, and on this latter date it was again continued on motion of attorneys for defendants to September 17th and again on motion of the same attorneys the case was continued to September 21st; on this date the defendants' attorneys moved to withdraw their appearance as attorneys for both defendants, which was allowed, and the motion of defendants to vacate and set aside the default judgment overruled.

neither defendant appearing they were defaulted and judgment was

entered against them in the sum of \$100.00.

On the same day, July 28th, 1938, defendant was again defaulted

against the First National Bank of Chicago. Subsequently the bank

attempted to satisfy the corporation on the preliminary proceedings

but the letter to this effect did not reach the corporation.

July 27th defendant Jack Lewis personally appeared in court

with attorney Lyman A. Grody at the time of Grody's absence, and on

that date the appearance of both defendants was entered by these at-

torneys; on the same day a petition was presented in behalf of the

defendants representing that the petition of Jack Lewis, and the de-

fendant and that he was the agent of Jack Lewis, and a corporation,

the other defendant; the petition set out as ground to return the

judgment that he was present in the court room on the day the judgment

was returnable but failed to state the date of the same.

The motion and petition were made on behalf of both defend-

ants, alleging that they had a good and sufficient defense to the

claim in that none of the respondents for which suit was brought was

received by defendants or said to them. The court allowed this peti-

tion to stand as defendants' affidavit of service, and judgment to

stand as security, and the case was set over to the next justice

of the municipal court for reconsideration.

The case was then reassigned and set for trial for August

6th; on that date, on motion of the attorneys for defendants, it

was continued to September 13th, and on that date it was again

continued on motion of defendant's attorneys for September 17th and

again on motion of the same attorneys the case was continued to

September 21st; on this date the defendants' attorneys moved to dis-

draw their appearance as attorneys for both defendants, which was al-

lowed, and the motion of defendants to vacate was set aside. The de-

fault judgment overruled.

October 2nd the defendant corporation filed its petition by other attorneys, asserting for the first time that it had never received a copy of the summons nor plaintiff's notice to prove its claim and its motion for judgment; that defendant corporation never authorized or employed Brody & Rabens to enter its appearance or to file a petition in the cause. The petition alleged that the service of process and alleged notice of taking judgment and the appearance and petition filed by Brody & Rabens constituted a fraud upon the court and upon defendant corporation. The petition asked for the vacation of the judgment of July 23rd entered against the defendant corporation.

January 21, 1937, hearing was had on the motion and petition, and leave was granted defendant corporation to file an amended petition; February 3th another hearing was had and leave was granted to file a second amended petition; February 18th a hearing was had on this last petition, after which the court overruled defendants' motion to vacate the judgment and this appeal follows.

Section 17, chap. 110 (Practice act) provides that an incorporated company may be served with process by leaving a copy thereof with any officer or agent thereof found in the county. Rule 10, par. 5 of the Municipal court is to the same effect. The service of the instant summons was upon Jack Kearns and upon Jack Kearns as agent for the corporation, and in none of the three petitions filed by it asking that the judgment be vacated does defendant corporation deny that Jack Kearns was its agent or dispute his verified statement that he was its agent.

Defendant's reply brief apparently admits that ordinarily the service of summons upon defendant corporation by serving Jack Kearns as its agent would comply with the statute and the Municipal court rule, but asserts that this is not so when Jack Kearns individually was also a party to the action and was personally interested in its outcome.

October 2nd the defendant corporation filed its petition by other attorneys, asserting for the first time that it had never received a copy of the summons nor defendant's notice to prove its claim and its motion for judgment; that defendant corporation never authorized or employed anyone to enter its premises or to file a petition in this court. The petition alleged that the service of process and alleged notice of taking judgment on the appearance and petition filed by proxy & Kearnas constituted a fraud upon the court and upon defendant corporation. The petition asked for the vacation of the judgment of July 2nd entered against the defendant corporation.

January 21, 1937, hearing was had on the motion and petition, and leave was granted defendant corporation to file an amended petition; February 1st another hearing was had and leave was granted to file a second amended petition; February 15th a hearing was had on this last petition, after which the court overruled defendant's motion to vacate the judgment and this is what follows.

Section 17, Chap. 110 (Practice Act) provides that an incorporated company may be served with process by leaving a copy thereof with any officer or agent thereof found in the county. Rule 10, par. 5 of the Michigan Court Rules provides that the service of the instant summons was upon Jack Kearnas and upon Jack Kearnas as agent for the corporation, and in none of the three petitions filed by it setting out the facts as stated by defendant corporation deny that Jack Kearnas was its agent or intimate associate.

Defendant's reply that Kearnas was not personally the service of summons upon defendant corporation by serving Jack Kearnas as its agent would comply with the statute and the Michigan Court Rules, but asserts that this is not so when Jack Kearnas is actually was also a party to the action and was personally interested in its outcome.

In defendant corporation's petition the only allegation concerning Kearns individually is that "he is also a defendant whose personal interest is antagonistic to the interest of petitioner." This bare statement is merely a conclusion. No facts are set forth from which the court could determine the nature of the antagonistic interest claimed.

Moreover, in the petition filed by Kearns seeking the vacation of the judgment, the defense asserted, namely that the goods in question were neither sold nor accepted by defendants, is the same defense that defendant corporation set up in its subsequent petitions. The same defense was repeatedly asserted in the petitions of both defendants.

Counsel for defendant corporation cite cases which have no application to the instant case. These cases involve a situation where one served with summons had some personal interest antagonistic to the interests of others whom he represented. As we have said, the antagonistic interest of Kearns to that of the defendant corporation does not appear. Rather, the petitions indicate the interests were the same.

As to the charge that the filing of its appearance by Brody & Rabens, attorneys, was fraudulent and without authority, it is sufficient to say that the appearance in a cause by an attorney is regarded as presumptive evidence of the authority of the attorney to act. Famous Mfg. Co. v. Wilcox, 180 Ill. 246; Thompson v. Emmert, 15 Ill. 415; Whittaker v. Murray, id. 293; Lawrence v. Jarvis, 32 Ill. 304. And withdrawal of the attorney of record from the case does not withdraw the appearance of the party for whom he appeared. 2 Ency. of Pl. & Pr., 697; Mason v. Abbott, 83 Ill. 445.

We see no reason to disturb the judgment and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

In defendant corporation's petition the only allegation con-
cerning bearing individually is that "as is also a defendant whose
personal interest is antagonistic to the interest of defendant."
This bare statement is merely a conclusion. It does not set forth
from which the court could determine the nature of the antagonistic
interest claimed.

Moreover, in the petition filed by parties seeking the res-
toration of the judgment, the defense asserted, namely that the parties
in question were neither sold nor accepted by defendant, is the
same defense that defendant corporation set up in its subsequent
petition. The same defense was repeatedly asserted in the peti-
tions of both defendants.

Counsel for defendant corporation cites cases which have no
application to the instant case. These cases involve a situation
where one served with an order and some personal interest antagonistic
to the interests of others was represented. As we have said,
the antagonistic interest of defendant is that of the defendant cor-
poration does not appear. Rather, the petition indicates the in-
terests were the same.

As to the charge that the filing of its petition was by proxy
& Habana, attorneys, was fraudulent and without authority, it is
sufficient to say that the appearance in a case by an attorney is
regarded as presumptive evidence of the authority of the attorney to
act. Habana v. ..., 130 Ill. 440; Habana v. ...,
131 Ill. 415; Habana v. ..., 132 Ill. 440; Habana v. ..., 133
Ill. 444. And withdrawal of the attorney of record from the case
does not withdraw the appearance of the party for whom he appeared.
2 Ency. of Ill. & W. 627; Habana v. ..., 134 Ill. 445.
We see no reason to disturb the judgment and it is affirmed.

39573

BENJAMIN B. MORRIS,
Appellee,

vs.

CARL EKSTROM,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

291 I.A. 614⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$500 entered upon the trial of an action in which plaintiff, an attorney, sought to recover fees pursuant to a written agreement between the parties.

Defendant filed his amended affidavit of merits, the gist of which is that, unknown to defendant, plaintiff at the time the agreement was made had an interest in the subject matter antagonistic to the interests of defendant. Therefore, he says, the agreement with plaintiff was void as contrary to public policy. Plaintiff moved to strike this affidavit of merits, which motion was sustained, and defendant electing to stand upon his affidavit judgment followed.

Plaintiff says the affidavit of merits contains many immaterial and irrelevant statements not germane to the subject matter of his employment.

The agreement, dated August 3, 1936, recites that the defendant retains and employs plaintiff to act for him as an attorney in a certain claim defendant had against "Heitman Trust Company, or Fred P. Heitman, or Philip C. Lindgren, or all of the above named, arising out of real estate owned by me heretofore known as the Crest Lawn Court Apartments." Plaintiff was to adjust or compromise or settle this claim either out of court or by suit, and defendant agreed to pay him as compensation for his services an amount equal to one-half of any amount in excess of \$1000 obtained

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2011 A. 614

THE JUDICIAL DEPARTMENT HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE FOLLOWING:

Defendant appeals from a judgment of the Circuit Court of the United States for the District of Columbia, rendered on the 10th day of December, 1900, in the case of the People of the District of Columbia vs. John Edgar Hoover, et al., No. 10,000. The judgment was rendered in favor of the defendant, and the plaintiff was ordered to pay the costs of the suit. The plaintiff appeals from the judgment on the ground that the same is contrary to law and equity. The plaintiff claims that the defendant is entitled to the sum of \$10,000 as damages for the loss of his property. The plaintiff also claims that the defendant is entitled to the sum of \$10,000 as costs of the suit. The plaintiff claims that the defendant is liable for the loss of his property because he was negligent in not taking proper care of the same. The plaintiff also claims that the defendant is liable for the costs of the suit because he was negligent in not taking proper care of the same. The defendant claims that he is not liable for the loss of the plaintiff's property because he was not negligent in not taking proper care of the same. The defendant also claims that he is not liable for the costs of the suit because he was not negligent in not taking proper care of the same. The plaintiff claims that the defendant is liable for the loss of his property because he was negligent in not taking proper care of the same. The plaintiff also claims that the defendant is liable for the costs of the suit because he was negligent in not taking proper care of the same. The defendant claims that he is not liable for the loss of the plaintiff's property because he was not negligent in not taking proper care of the same. The defendant also claims that he is not liable for the costs of the suit because he was not negligent in not taking proper care of the same.

on said claim by settlement or otherwise. If the amount realized on the claim was \$1000 or less, then plaintiff was to receive no payment for his services. The agreement further recited that it was to cover defendant's claim against the Chicago Title & Trust Company, "arising out of the above building, and also in foreclosure known as case No. 343 3008, entitled Chicago Title & Trust Company, Trustee, v. Edward Gee, Carl Ekstrom et al."

The statement of claim alleged that defendant turned over to plaintiff checks payable to the Heitman Trust Company and a number of other documents; that plaintiff did represent defendant, and while doing so defendant, without notice to plaintiff and without his knowledge, settled the matter, receiving in settlement \$2000; that therefore, under the terms of the agreement, plaintiff was entitled to \$500, which defendant failed and refuses to pay.

The affidavit of defense states that defendant was the owner of the Crest Lawn Court Apartments; that foreclosure proceedings had been commenced by the Chicago Title & Trust Company, which filed its bill as trustee on behalf of the bondholders, and that plaintiff was the owner of two of the bonds aggregating \$1000. Defendant further said that he had no defense to the foreclosure suit, that plaintiff failed to file defendant's appearance in the foreclosure suit and advised defendant that he had no legal defense to such foreclosure suit.

These allegations are not a sufficient reply to plaintiff's statement of claim. It does not clearly appear from the agreement of employment that plaintiff was to represent defendant in the foreclosure proceeding. Apparently defendant had a claim against Heitman Trust Company or Fred P. Heitman or Philip C. Lindgren, which plaintiff was employed to prosecute; but what connection these parties had with the foreclosure suit does not appear. The only reference to a foreclosure contained in the agreement is in its last paragraph, which recites that it is to cover defendant's claim against the Chicago Title & Trust Company arising out of a foreclosure suit.

on said claim by settlement or otherwise. In the amount realized on the claim was \$1000 or less, from which it was to receive no payment for his services. The agreement between the parties was that it was to cover defendant's claim against the Chicago Title & Trust Company, "arising out of the above will," and that in a resolution known as case no. 343 300, entitled Chicago Title & Trust Company, Trustee, v. Edward G. Galt, Executor et al."

The statement of claim filed with defendant's answer to plaintiff's claim payable to the defendant trust company and a number of other documents; that plaintiff was not a defendant, and while being so defendant, without notice to plaintiff and without his knowledge, settled the matter, resulting in judgment \$1000; that therefore, under the terms of the agreement, plaintiff was entitled to \$1000, which defendant failed and refused to pay.

The affidavit of James Edgar Galt, defendant, and the owner of the Great West Coast Apartments; that defendant's proceedings had been commenced by the Chicago Title & Trust Company, which filed its bill as trustee in behalf of the common interest, and that plaintiff was the owner of one of the units in the building, \$1000. Defendant further said that he had no authority to act for defendant, and that plaintiff failed to file defendant's answer in the foreclosure suit and advised defendant that he had no legal business in such foreclosure suit.

James Edgar Galt, the defendant, was not a defendant in plaintiff's statement of claim. It does not clearly appear from the agreement of employment that plaintiff was to represent defendant in the foreclosure proceedings. Defendant's defense was a claim against defendant Trust Company or Trust & Trust Company, which plaintiff was entitled to recover; and that connection these parties had with the foreclosure suit was not shown. The only reference to a foreclosure contained in the agreement is in its last paragraph, which recites that it is to cover defendant's claim against the Chicago Title & Trust Company arising out of a foreclosure suit.

The allegation in the affidavit of defense which asserts that the interest of plaintiff was opposed to and antagonistic to that of defendant is merely a statement of conclusion, based on no facts appearing in the amended defense.

The affidavit of defense does not disclose the materiality or connection between plaintiff's alleged ownership of the ^{two} bonds secured by the trust deed to the Chicago Title & Trust Company, and the services which plaintiff was employed to perform with reference to defendant's claim against the parties named in the agreement of employment. These parties, so far as shown by the pleadings, were in no way connected with the foreclosure proceeding.

It follows therefore, that the failure to disclose plaintiff's ownership of the bonds was not material to the subject matter of his employment and should not prevent his recovery under the terms of the contract. In Hunter v. Troup, 315 Ill. 293, the plaintiff brought suit to recover compensation for legal services rendered in settling an estate; the defense was that he was not entitled to recover, as he had an interest which was adverse to and conflicting with the interest of his client; plaintiff had in his possession a certain deed executed by the testatrix and the defendant asserted that his failure to disclose this was adverse to defendant's interests. It was held that the concealment was not of a material fact such as would prevent the recovery of compensation for services rendered. So in the case at bar, the fact that plaintiff concealed his ownership of certain bonds secured by trust deed on the premises owned by defendant is not shown to have affected or be connected with the prosecution of defendant's claim against persons not connected with the ownership of the premises.

It is well settled that where an attorney is employed to perform legal services and his client puts it out of his power to

The allegation in the affidavit of service which asserts that the interest in the land was conveyed to the defendant is based on no fact of delivery in writing of a deed of conveyance, based on no facts appearing in the record and none.

The affidavit of service does not disclose the contents of the commission between plaintiff's alleged ownership of the land secured by the deed to the defendant and the defendant, and the service which plaintiff was required to perform with respect to the defendant's claim against the parties named in the affidavit of employment. These parties, so far as known by the plaintiff, were in no way connected with the foregoing proceedings.

It follows therefore, that the failure to disclose the contents of the affidavit of service was not material in the plaintiff's case. The plaintiff's affidavit and the service which plaintiff was required to perform with respect to the defendant's claim against the parties named in the affidavit of employment, in the plaintiff's case, are the basis of the contract. In Smith v. Smith, 111 Ill. 202, the plaintiff sought to recover compensation for legal services rendered in settling an estate; and the defendant was held to be liable to recover, as he had an interest which was giving to him a right in the interest of his estate; and in his possession a certain fact created by the plaintiff and the defendant's interest that his failure to disclose this was material to the plaintiff's interest. It was held that the defendant was not at all liable to such as would prevent the recovery of compensation for services rendered. And in the case of Smith v. Smith, 111 Ill. 202, the plaintiff's ownership of certain lands was established by title deed to the plaintiff and the defendant was not at all liable to such as would prevent the recovery of compensation for services rendered. And in the case of Smith v. Smith, 111 Ill. 202, the plaintiff's ownership of certain lands was established by title deed to the plaintiff and the defendant was not at all liable to such as would prevent the recovery of compensation for services rendered.

It is well settled that where an affidavit is required to be sworn to by a party, and the party is not at all liable to such as would prevent the recovery of compensation for services rendered.

comply with the contract, as by compromising without the attorney's knowledge or consent, he is entitled to compensation for his services in compliance with the terms of the contract. Millard v. County of Richland, 13 Ill. App. 527-534; Town of Mt. Vernon v. Patton, 94 Ill. 65; Barnes v. Barnes, 225 Ill. App. 68.

The ruling of the court striking the amended affidavit of defense was proper, and as it is not denied that defendant received in settlement of his claim \$2000 and that under the contract of employment plaintiff was to receive one-half of any amount obtained in excess of \$1000, the judgment for \$500 is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39582

COSTENZIA COSTA,

Appellee,

vs.

ORDER SONS OF ITALY IN AMERICA,

Appellant.

419A
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

291 I.A. 615¹

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a suit upon a benefit certificate in the defendant order, issued to Mazzareno Costa, the son of plaintiff, in which she was named as beneficiary. Plaintiff claimed that the certificate was delivered to Mazzareno Costa, in which defendant agreed to pay plaintiff in case of his death \$600; that he died October 26, 1934, while the certificate was in full force and effect; that the terms of the certificate had been complied with; that proof of death had been furnished but that defendant has refused to pay the sum mentioned in the certificate.

The defense asserted was that Mazzareno Costa was never admitted to beneficiary membership in the defendant order; that the certificate was not in full force and effect, and that plaintiff had failed to institute her suit within one year from the date of death of Mazzareno Costa, as required by the terms of the certificate.

The case was heard by a jury and a verdict returned upon which judgment was rendered. The abstract filed by defendant does not show in whose favor the verdict ran nor the amount of the judgment rendered. Such matters are vital and should be shown in the abstract and properly indexed.

We gather from the statement of counsel that the verdict was against defendant and that judgment for \$675 in favor of plaintiff was entered, from which defendant appeals.

The only defense presented upon the trial was that suit

COSTA RICA

Appellate

vs.

ORDER OF THE COURT

Appellate

2011.11.15

MR. JUSTICE MCGOWAN DELIVERED THE OPINION OF THE COURT.

This is a writ upon a writ of habeas corpus in the nature of an order, issued to the Court, the son of plaintiff, in which she was named as beneficiary. Plaintiff claimed that the certificate was delivered to the Court, in which defendant agreed to pay plaintiff in case of his death \$500; that he died October 26, 1934, while the certificate was in full force and effect; that the terms of the certificate had been complied with; that proof of death had been furnished but that defendant had refused to pay the sum mentioned in the certificate.

The defense asserted that the Court was never admitted to beneficiary membership in the defendant order; that the certificate was not in full force and effect, and that plaintiff had failed to insert the correct date in the year from the date of death of defendant, as required by the terms of the certificate.

The case was heard by a jury and a verdict returned upon which judgment was rendered. The verdict was in favor of the plaintiff and the amount of the verdict was \$500. The judgment rendered, which was in favor of the plaintiff, does not show in those terms the verdict was in favor of the plaintiff and the amount of the verdict was \$500. The judgment rendered, which was in favor of the plaintiff, does not show in those terms the verdict was in favor of the plaintiff and the amount of the verdict was \$500.

We gather from the statement of counsel that the verdict was against defendant and that judgment for \$500 in favor of plaintiff was entered, from which defendant appeals. The only defense presented upon the trial was that the

was not commenced within one year from the date of death, as required under section 12 of the benefit certificate. Nazzareno Costa died October 26, 1934, and suit was commenced December 6, 1935, about six weeks after the expiration of the year period.

Plaintiff alleged and sought to prove that the company by its actions waived this period of limitation. The claim was filed by the beneficiary in the month of January, 1935. There was some evidence that the following April defendant denied liability and a letter to this effect was written by defendant's secretary, although we do not find the letter in the record. Peter D. Giachini testified that he was retained by the plaintiff as her attorney to prosecute her claim, approximately in June, 1935; he wrote to defendant about plaintiff's claim and in reply received a letter dated June 15, 1935, saying that the reason for refusing payment was that Costa had never been initiated in the lodge and therefore never became a member of defendant order. The record also shows another letter written by defendant's secretary, which is in Italian and which translated seems to advise that the certificate was "illegally consigned."

The attorney for plaintiff then conferred with the "Grand Venerable" - Mr. Spatuzza of the defendant order - with reference to plaintiff's claim. The question arose as to whether an initiation was necessary to make the policy valid. Mr. Giachini testified that he had various conversations with Mr. Spatuzza along in June, July and September, in which he told Mr. Spatuzza that initiation was not necessary, to which Mr. Spatuzza said that they would pay the amount of money named in the certificate but asked witness to get in touch with him later; that shortly before the expiration of the twelve months after the death of Costa, Mr. Spatuzza requested him to withdraw suit and that he would "contact" him and let him know. Mr. Spatuzza testified, denying that he advised Mr. Giachini

was not commenced within one year from the date of death, as required under section 11 of the Decedent's will. However, Costa died October 26, 1934, and suit was commenced December 6, 1935, about six weeks after the expiration of the year period. Plaintiff alleged and sought to prove that the company by its actions waived this period of limitation. The claim was filed by the beneficiary in the month of January, 1935. There was some evidence that the following April defendant denied liability and a letter to this effect was written by defendant's secretary, although we do not find the letter in the record. Later in the trial plaintiff testified that he was retained by the plaintiff as her attorney to prosecute her claim, approximately in June, 1935; he wrote to defendant about plaintiff's claim and in reply received a letter dated June 1, 1935, saying that the reason for retaining plaintiff was that Costa had never been initiated in the lodge and therefore never became a member of defendant order. The record also shows another letter written by defendant's secretary, which is in Italian and which translated seems to advise that the certificate was "illegally cancelled."

The attorney for plaintiff then conferred with the "Grand Venerable" - Mr. Venerable of the defendant order - with reference to plaintiff's claim. The question arose as to whether an initiation was necessary to make the policy valid. Mr. Venerable testified that he had various conversations with Mr. Venerable and in June, July and September, in which he advised that plaintiff's claim was not necessary, in which Mr. Venerable said that they would pay the amount of money named in the certificate but need not witness to get in force with the latter; that a court before the initiation of the twelve months after the death of Costa, Mr. Venerable requested him to withdraw suit and that he would "cancel" him and let him know. Mr. Venerable testified, saying that he advised Mr. Venerable

to withhold suit.

The jury saw the respective witnesses and was better able to pass upon their credibility than is a court of review. The fact that defendant based its refusal to pay for a reason which, after a time, it abandoned, might reasonably lead the jury to conclude that defendant desired to avoid making payment and that its conduct with reference to the claim was motivated to this end. At least the record does not disclose any sufficient reason to hold that the verdict is manifestly against the weight of the evidence.

Both counsel have cited a large number of cases touching upon circumstances which would constitute a waiver of such a provision in a policy or certificate as is here presented. It has been held generally that a waiver may be proved by inference from the acts of the company in holding out reasonable hope of adjustment, and that slight evidence only is needed to create a waiver of the stipulation of the time within which to bring suit. Among the many cases touching this question are Allemania Fire Ins. Co. v. Peck, 133 Ill. 220; Andes Ins. Co. v. Fish, 71 Ill. 620; Clark v. The Pacific Mut. Life Ins. Co., 185 Ill. App. 530; F. & M. Ins. Co. v. Chesnut, 50 Ill. 111. Cases involving somewhat different circumstances are cited by defendant, which it is unnecessary to distinguish in detail. It is enough to say that the circumstances presented to the jury were sufficient to justify its verdict, and the judgment thereon is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

to withhold said.

The jury saw the responsive witnesses and yet better able

to pass upon their credibility than is a court of review. The

fact that defendant based his refusal to pay for a reason which,

after a time, it appeared, might reasonably lead the jury to

conclude that defendant desired to avoid making payment and that

its conduct with reference to the claim was motivated to this end.

At least the record does not disclose any sufficient reason to hold

that the verdict is manifestly against the weight of the evidence.

Not counsel have cited a large number of cases holding

upon circumstances which would constitute a review of such a verdict.

sion in a policy or certificate as is here presented. It has been

held generally that a waiver may be proved by inference from the acts

of the company in withholding its reasonable share of adjustment, and

that all but evidence only is needed to create a waiver of the assign-

tion of the fund arising under the policy. See *W. H. H. v. H. H. H.*

touching this question the W. H. H. v. H. H. H., 123 Ill.

220; W. H. H. v. H. H. H., 111 Ill. 111; W. H. H. v. H. H. H., 111 Ill.

W. H. H. v. H. H. H., 111 Ill. 111; W. H. H. v. H. H. H., 111 Ill.

111. 111. Cases involving somewhat different circumstances are

cited by defendant, and it is unnecessary to distinguish in de-

tail. It is enough to say that the circumstances presented to the

jury were sufficient to justify its verdict, and the judgment

thereon is affirmed.

APPROVED.

O'Connor, J., and McDevitt, J., concur.

25621

LILLIAN MARGUERITE SPENCER,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY
and CHICAGO RAILWAYS COMPANY,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

291 I.A. 615²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

May 2, 1918, plaintiff, then a child just past three years of age, wandered away from her home in Chicago and was struck by one of defendants' street cars at the intersection of North and Western avenues, sustaining a serious injury to her left foot. The facts are recited in detail in the opinion of this court filed in Spencer v. Chicago City Ry. Co. et al., 220 Ill. App. 436. Suit by guardian was brought in her behalf in the Superior court against the two railway companies, and a declaration of two counts was filed. One of the counts charged general negligence in the operation of the street car, and the second count charged negligence in failing to ring a bell, sound a gong or otherwise notify plaintiff of the approach of the car. Upon trial before Judge David and a jury, at the close of all the evidence there was an instruction that plaintiff could not recover under the second count. The cause was then submitted to the jury under the first count and a verdict for plaintiff with damages assessed at \$5000 was returned. Judgment was entered on the verdict, and defendants appealed to this court.

This court being of the opinion that a preponderance of the evidence indicated that the defendants were not negligent according to the practice then existing, reversed the judgment with a finding of fact without remanding the cause. Spencer v. Chicago City Railway Co. et al., 220 Ill. App. 436. This practice was afterward modified by the decision of the Supreme court in Wirich

WILLIAM MARGUERITE BRIDGES, Appellee,
vs.
CHICAGO CITY RAILWAY COMPANY
and CHICAGO RAILWAYS COMPANY,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

2
2511.A.615

MR. JUSTICE MATTHEW DELIVERED THE OPINION OF THE COURT.

May 2, 1918, plaintiff, then a child just past three years of age, wandered away from her home in Chicago and was struck by one of defendant's street cars at the intersection of North and Western avenues, sustaining a serious injury to her left foot. The facts are recited in detail in the opinion of this court filed in Spencer v. Chicago City Ry. Co. et al., 250 Ill. App. 456. Suit by guardian was brought in her behalf in the Circuit Court against the two railway companies, and a declaration of two counts was filed. One of the counts charged general negligence in the operation of the street car, and the second count charged negligence in failing to ring a bell, a third count charging negligence in failing to stop the car. Upon trial before Judge Davis and a jury, all the facts of all the evidence there was an instruction that plaintiff could not recover under the second count. The cause was then submitted to the jury under the first count and a verdict for plaintiff with damages assessed at \$5000 was returned. Judgment was entered on the verdict, and defendant appealed to this court.

This court being of the opinion that a preponderance of the evidence indicated that the defendants were not negligent according to the practice then existing, reversed the judgment with a finding of fact without reversing the cause. Spencer v. Chicago City Railway Co. et al., 250 Ill. App. 456. This practice was afterward modified by the decision of the Supreme Court in Michie

v. Forschner Contracting Co., 312 Ill. 343. April 9, 1935, plaintiff sued out of the Supreme court a writ of error to review the judgment of this court, and the Supreme court, following its decision in Segal v. C. C. Ry. Co. et al., 325 Ill. 43, reversed the judgment of this court and remanded the cause with directions to this court to either affirm the judgment of the trial court or reverse it and remand the cause to the Superior court for a new trial. Spencer v. Chicago City Railway Co. et al., 366 Ill. 120. Pursuant to the mandate of the Supreme court the appeal was re-docketed in this court. The parties have filed new briefs, and at their request have been heard on oral argument.

The contention of defendants now is in the first place, that under the finding of this court/^{that} the verdict is against the manifest weight of the evidence, the judgment of the trial court must be reversed and the cause remanded for another trial. Secondly, they make the further contention that instruction 4, given at plaintiff's request, is reversibly erroneous, and that the judgment should be reversed and the cause remanded for that reason. On the other hand plaintiff points out that since the brief of defendants and the former opinion of the Appellate court recognize that the facts were undisputed (except with reference to immaterial issues), since the testimony of the different sets of witnesses was wholly consistent with each other, and since the Supreme court has held as a matter of law that there was an issue of fact for the jury, this court should now hold as a matter of law that defendants were liable and affirm the judgment. In support of this contention the plaintiff relies on Thomas v. Buchanan, first decided by this court in 272 Ill. App. 308, afterward reversed by Ill., the Supreme court in volume 357/ page 270, and upon reconsideration affirmed by this court in 277 Ill. App. 394.

We are not convinced by plaintiff's argument. The conten-

v. Forebaker Contracting Co., 318 Ill. 343, April 9, 1935, plain-

liff sued out of the Supreme court a writ of error to review the judgment of this court, and the Supreme court, following its decision in Reel v. C. W. Co., et al., 325 Ill. 44, reversed the

judgment of this court and remanded the cause with directions to

this court to either affirm the judgment of the trial court or

reverse it and remand the cause to the Superior court for a new

trial. Reel v. Chicago City Railway Co., 1, 336 Ill. 120.

Pursuant to the mandate of the Supreme court the appeal was re-

doctored in this court. The parties have filed new briefs, and at

their request have been heard on oral argument.

The contention of defendants now is in the first place,

that under the finding of this court the verdict is against the

plaintiff's weight of the evidence, the judgment of the trial court

must be reversed and the case remanded for another trial. Secondly,

they make the further contention that instruction 4, given at

plaintiff's request, is reversibly erroneous, and that the judg-

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On the other hand plaintiff points out that since the trial of

defendants and the former opinion of the Appellate court recognize

that the facts were undisputed (except with reference to immaterial

issues), since the testimony of the different sets of witnesses

was wholly consistent with each other, and since the Supreme court

has held as a matter of fact that there was an issue of fact for

the jury, this court should now hold as a matter of fact that de-

fendants were liable and affirm the judgment. In support of this

contention the plaintiff relies on Thomas v. Buchanan, 112 Ill.

held by this court in 272 Ill. App. 303, afterwards reversed by

Ill.

the Supreme court in volume 327, page 270, and upon reconsideration

affirmed by this court in 277 Ill. App. 204.

We are not convinced by plaintiff's argument. The conten-

tion now made that no issue of fact is presented for a jury is contrary to the contention made by plaintiff in the Supreme court upon which she obtained a reversal of the judgment of this court. Her contention there was that the evidence presented an issue of fact for the jury to decide, and the Supreme court so held. Plaintiff now contends upon the same evidence that the court should hold as a matter of law that defendants were guilty of negligence. Manifestly this we cannot do. The Supreme court did not hold as a matter of law that defendant was guilty of negligence, but on the contrary held that under the facts as presented in the record there was, as a matter of law, an issue of fact which would compel either the affirmance of the judgment entered upon the verdict of the jury, or the remandment of the cause for trial before another jury. If the Supreme court had held as a matter of law that defendants were negligent, manifestly it would have reversed the judgment of this court and affirmed the judgment of the trial court. It did not do this but directed this court in its discretion to either affirm the judgment of the trial court or reverse that judgment and remand the issue of fact, which the Supreme court found to exist, to another jury.

In Thomas v. Buchanan, supra, Hiram Thomas, the husband of the plaintiff administratrix, was killed while riding in an automobile owned and driven by Earl Anderson, the automobile having collided with another automobile owned by the defendant. There was a judgment in the trial court for the plaintiff. Upon appeal to this court it was held as a matter of law that Anderson was the agent of the deceased, was acting in the scope of his employment at the time of the collision, and that he was guilty of contributory negligence which would bar a recovery by plaintiff. Upon review by the Supreme court it was held as a matter of law that there was no evidence tending to show that Anderson was the agent of defendant at the time of the accident; that no such issue was presented

tion now made that no issue of fact is presented for a jury in conformity to the contention made by plaintiff in the Supreme court upon which she obtained a reversal of the judgment of this court. Her contention there was that the evidence presented an issue of fact for the jury to decide, and the Supreme court so held. Plaintiff now contends upon the same evidence that a court should hold as a matter of law that defendants were guilty of negligence. Manifestly this we cannot do. The Supreme court did not hold as a matter of law that defendant was guilty of negligence, but on the contrary held that under the facts as presented in the record there was, as a matter of law, an issue of fact which would entitle either the attendance of the judgment entered upon the verdict of the jury, or the reversal of the case for trial before another jury. If the Supreme court had held as a matter of law that defendants were negligent, manifestly it would have reversed the judgment of this court and affirmed the judgment of the trial court. It did not do this but affirmed this court in its discretion to either affirm the judgment of the trial court or reverse that judgment and remand the case of fact, which the Supreme court found to exist, to another jury.

In Thomas v. Woodson, 117 U.S. 430, 11 S.Ct. 1050, 30 L.Ed. 1180, the plaintiff administratrix, was killed while riding in an automobile owned and driven by Earl Anderson, the auto being having collided with another automobile owned by the defendant. There was a judgment in the trial court for the plaintiff. Upon appeal to this court it was held as a matter of law that Anderson was the agent of the deceased, was acting in the scope of his employment at the time of the collision, and that he was guilty of contributory negligence which would bar a recovery by plaintiff. Upon review by the Supreme court it was held as a matter of law that there was no evidence tending to show that Anderson was the agent of defendant and at the time of the accident; that no such issue was presented

upon the trial of the case. Moreover, that if there was any issue concerning ~~that~~ relationship there was sufficient evidence to go to the jury on it, and that the trial court would not have been warranted in taking the case from the jury even though the driver, Anderson, was as a matter of fact guilty of contributory negligence. The Supreme court, however, held as a matter of law that the defendant was guilty of negligence, but that it could not be held that the conduct of Anderson was such as to warrant an instruction that he was guilty of contributory negligence as a matter of law. For these reasons the Supreme court said the Appellate court was not justified in reversing the judgment without remanding the cause for a new trial.

The Supreme court therefore reversed the judgment with the unusual direction that the Appellate court consider the assignment of errors "other than the two here decided," and either affirm the judgment or reverse and remand the cause for a new trial. The Appellate court, upon reconsideration in conformity with these directions of the Supreme court, concluded it could not find the plaintiff guilty of contributory negligence. This and other assignments of error were considered as directed and found to be without merit upon the record. The judgment was therefore affirmed. The case is clearly distinguishable from this. Here there is only one finding of law by the Supreme court, namely, that there was evidence sufficient to require that the ultimate issue of whether defendants were negligent should be submitted to another jury in case the judgment of the trial court was not affirmed. The finding of this court upon a review of the record was that the verdict of the jury in favor of plaintiff was clearly and manifestly against the weight of the evidence on the issue of the negligence of defendants. This presented a clear issue of fact which the Supreme court was without

upon the trial of the case. Moreover, that if there was any reason concerning the relationship there was sufficient evidence to go to the jury on it, and that the trial court would not have been warranted in taking the case from the jury even though the driver, Anderson, was as a matter of fact guilty of contributory negligence. The Supreme court, however, held as a matter of law that the defendant was guilty of negligence, but that it could not be held that the conduct of Anderson was such as to warrant an instruction that he was guilty of contributory negligence as a matter of law. For these reasons the Supreme court said the Appellate court was not justified in reversing the judgment without remanding the case for a new trial.

The Supreme court therefore reversed the judgment and the unusual direction that the Appellate court consider the assignment of errors "other than the two here decided," and either affirm the judgment or reverse and remand the case for a new trial. The Appellate court, upon reconsideration in conformity with these directions of the Supreme court, concluded it could not find the plaintiff guilty of contributory negligence. This and other assignments of error were considered as directed and found to be without merit upon the record. The judgment was therefore affirmed. The case is clearly distinguishable from this. Here there is no finding of law by the Supreme court, namely, that there was evidence sufficient to require that the issue of contributory negligence were negligent should be submitted to another jury in case the judgment of the trial court was not affirmed. The finding of this court upon a review of the record was that the verdict of the jury in favor of plaintiff was clearly and manifestly against the weight of the evidence on the issue of the negligence of defendant. This presented a clear issue of fact which the Supreme court was without

jurisdiction to consider and which it did not consider. Under similar circumstances we believe it has been the unvaried practice of this court throughout the years to reverse the judgment and remand the cause for trial. We have weighed the evidence as was the duty of this court and have found the verdict to be against the clear and manifest preponderance of the evidence. Even if we had the power under such circumstances to reconsider it (a question now unnecessary for us to determine) we would not arrive at any other or different conclusion. ^{It} follows that there must be another trial of the issues.

As the cause must be retried it seems appropriate that we should give consideration to the error assigned and argued with reference to plaintiff's 4th instruction. The instruction is as follows:

"You are the sole judges of the question of fact in this case, and should determine the same from the evidence in the case under the instructions of the court, as to the law. But the court does not mean by any instructions given to the jury to tell them what they shall find as to any fact in the case, and you should not be influenced in the slightest degree as to the facts in the case by any assertion or statement of counsel on either side of the case unless there is evidence in the case tending to sustain the same."

Defendants contend that the instruction is objectionable because it told the jury that they must determine the questions of fact from the direct evidence in the case, and that the jury should not be influenced in the slightest degree as to the facts in the case by any argument of counsel unless there was evidence in the case tending to sustain the same. It is argued that the substance of the instruction was calculated to induce the jury to disregard matters of common knowledge and experience in the affairs of life and to ignore the arguments of counsel. It is also contended that as applied to this case the instruction was erroneous because under the facts the arguments of defendants' counsel were necessarily largely based upon common knowledge, and defendants

jurisdiction to consider and which it did not consider. Under
 similar circumstances we believe it has been the unwritten practice
 of this court throughout the years to reverse the judgment and
 remand the case for trial. We have held the evidence as was
 the duty of this court and have found the verdict to be against the
 clear and manifest preponderance of the evidence, even if we
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 reference to the instruction. The instruction is as
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"You are the sole judges of the question of fact in this case,
 and should determine the same from the evidence in the case under
 the instructions of the court, as to the law. And the court does
 not mean by any instructions given to the jury to tell them what
 they shall find as to any fact in the case, and you should not be
 influenced in the slightest degree as to the facts in the case by
 any assertion or statement of counsel on either side of the case,
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 disregard matters of common knowledge and experience in the affairs
 of life and to ignore the arguments of counsel. It is also con-
 tended that as applied to this case the instruction was erroneous
 because under the facts the arguments of defendants' counsel were
 necessarily largely based upon common knowledge, and defendants

summarize their objections by stating that the instruction tended to nullify the legitimate arguments of counsel in the case. A somewhat similar instruction seems to have been held correct in Penn Co. v. Greso, 102 Ill. App. 257, and there are, of course, many cases holding that it is improper for counsel in argument to go outside the evidence in the record. The right of counsel to present to the jury reasonable inferences from facts in evidence and reason along the line of their common experience is an integral part of trial by jury as it exists in this State. While hesitating to hold that the giving of this instruction constitutes reversible error, we think the instruction is subject to criticism. In determining whether the instruction is reversibly erroneous, necessarily much would depend upon the nature of the argument made by counsel to the jury. In this case, however, there is no objection in that regard. We think the instruction ought not to have been given. For other reasons stated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

summarize their objections by stating that the instruction tended to nullify the legitimate arguments of counsel in the case. A somewhat similar instruction seems to have been held correct in Go. v. Gress, 102 Ill. App. 227, and there it, of course, many cases holding that it is improper for counsel in argument to go outside the evidence in the record. The right of counsel to present to the jury reasonable inferences from facts in evidence and reason along the line of their common experience is an integral part of trial by jury as it exists in this state. While hesitating to hold that the giving of this instruction constitutes reversible error, we think the instruction is subject to criticism. In determining whether the instruction is reversibly erroneous, necessarily much would depend upon the nature of the argument made by counsel to the jury. In this case, however, there is no objection in that regard. We think the instruction ought not to have been given. For other reasons stated the judgment is reversed and the case remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McGovern, J., concur.

39447

ANDREW L. HALLEMAN,
Appellee,

vs.

WILLIAM G. ALLEN, ANNIE ALLEN,
WILLIAM D. MARTIN, as Trustee
in Trust Deed dated June 6, 1927,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COCK COUNTY.

291 I.A. 615³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a decree of foreclosure entered October 19, 1936. The cause was heard upon exceptions to the report of a master to whom it had been referred to take evidence and report. Exceptions were overruled and a decree of sale and foreclosure entered in conformity with the recommendations of the master.

Plaintiff filed his bill May 13, 1936, averring the execution on June 6, 1927, by William G. Allen and Anna, his wife, of a trust deed conveying to William D. Martin, as trustee, premises situated in Chicago, to secure the payment of an indebtedness represented by a principal note of the makers for \$3,000, payable to the order of themselves and by them endorsed, with interest until maturity at the rate of 6% per annum, represented by interest coupons maturing upon the dates on which interest would become due and payable upon the principal note, according to its terms. The bill also agreed that on May 25, 1932, the principal note being about to mature, defendant Pearl Nelsen, a spinster, then holding title, entered into an extension agreement with the plaintiff in and by which the time of payment of the note was extended for the further term of three years, the interest for said extended period being represented by interest coupons executed by her, maturing upon the dates upon which interest would become due and payable during this extended period. The bill also averred default in the payment of interest, and the election of

OR THE COURT.
 COUNTY OF ...

2011 A. 615

ALFRED L. WALLACE,
 Appellant,
 vs.
 WILLIAM O. ALLEN, as Trustee,
 WILLIAM O. ALLEN, as Trustee,
 in Trust Deed dated June 8, 1927,
 Appellee.

MR. JUSTICE LATIMER DELIVERED THE OPINION OF THE COURT.

This is an appeal by the appellant from a decree of the circuit court entered October 10, 1933. The case was then known as *Allen v. Wallace*. The report of the court is not before me, but it is stated that the decree was entered. The facts are stated in conformity with the record in the case.

On June 8, 1927, by William O. Allen and wife, as trustee, a deed was conveyed to Alfred L. Wallace, as trustee, in Chicago, Ill. The deed was for the purpose of conveying to the trustee a principal note of the Western Loan Association, payable in the sum of \$10,000.00, and by the association, after interest shall maturely at the rate of 6 per annum, to be paid by the association monthly from the dates on which interest was due. The deed also provided that the principal note, according to its terms, was to be paid on May 25, 1927, the principal note was to be paid to Alfred L. Wallace, as trustee, and the association was to extend also agreement with the association in and to which the time stipulated of the note was extended for the further term of three years, the interest for this extended period being to be paid by interest current account of 6 per annum, and the dates when interest would become due and payable during this extended period. The bill also averred that in the payment of interest, and the election of

plaintiff (alleged to be the owner and holder of the notes and coupons) to declare the whole amount due and payable. Numerous persons were made defendants, including William D. Martin as trustee. Some of them, including Martin, answered, neither admitting nor denying the averments of the bill. Pearl Nelson answered averring that she was on August 24, 1927, the owner of the notes and trust deed, and that on that date she acquired title to the premises by warranty deed from the Allens. She averred that some time in September or October, 1928, plaintiff stated to her that he had a customer who wished to buy a mortgage and that she thereupon gave to him a list of certain mortgages that were for sale; that he afterward returned to the office and stated that he wished to take this trust deed and the notes mentioned in the bill of complaint; that she delivered them to him without receiving any consideration therefor, and that when she requested their return plaintiff told her that he had given credit therefor to William D. Martin, one of the defendants, on his account with the Templeton Lime Company. She therefore averred that plaintiff was not the owner of the notes and trust deed. This was the sole issue of fact and the only defense presented.

The master in his report found that it had been conclusively proven from voluminous exhibits which were returned with the report that Pearl Nelsen did not at any time have any interest in the mortgage, and that in all her dealings with plaintiff she acted as the owner of the real estate and not of the mortgage, and that it was his conclusion "beyond any question of doubt, that Andrew L. Halleman is the legal owner and holder of the Trust Deed, Principal Note, Extension Interest coupon and Extension Agreement, received in evidence herein, and is entitled to foreclose the lien of the said Trust Deed." Pearl Nelsen does not appear in this court, but

plaintiff (allied to be the owner and holder of the notes and coupons) to declare the whole amount due and payable. Numerous persons were made defendants, including William L. Martin as trustee. Some of them, including Martin, answered, neither admitting nor denying the allegations of the bill. Pearl Nelson answered averring that she was on August 24, 1927, the owner of the notes and trust deed, and that on that date she acquired title to the premises by voluntarily deed from the Aliens. She averred that some time in September or October, 1928, plaintiff asked to pay that he had a customer who wished to buy a mortgage and that she thereupon gave to him a list of certain mortgages that were for sale; that he afterward returned to the office and stated that he wished to take this first deed and the notes mentioned in the bill of complaint; that she delivered them to him without receiving any consideration therefor, and that when she requested their return plaintiff told her that he had given credit therefor to William D. Martin, one of the defendants, on his account with the Tenthredine Life Company. She therefore averred that plaintiff was not the owner of the notes and trust deed. His was the sole issue of fact and the only defense presented.

The master in his report found that it had been conclusively proven from voluminous exhibits which were returned with the report that Pearl Nelson did not at any time have any interest in the mortgage, and that in all her dealings with plaintiff she acted as the owner of the real estate and not of the mortgage, and that it was his conclusion "beyond any question of doubt, that Andrew L. Hallman is the legal owner and holder of the Trust Deed, principal note, Extension Interest coupon and Extension Agreement, received in evidence herein, and is entitled to foreclose the lien of the said Trust Deed." Pearl Nelson does not appear in this court, but

in a brief filed in behalf of the Allena and William D. Martin, as trustee, the contention is made that the finding of the master and the decree that plaintiff was the bona fide legal holder of the note and trust deed is not sustained by the evidence, and that the decree should be reversed for that reason.

The method adopted by defendants to this end is unusual in that they present an abstract containing all the evidence supposed to be favorable to defendants' contention and omitting practically all the evidence tending to disprove it. The plaintiff has, however, presented much of the omitted evidence in an additional abstract. It does not appear, however, from either abstract that the record contains all the evidence received upon this trial of the cause, and we would therefore be justified in refusing to weigh the evidence. Nelson v. Seymour, 248 Ill. App. 392, and Rule 6 of this court. However, we have examined the record and find that it contains all the evidence submitted upon the trial. We have therefore examined the evidence bearing upon this issue.

The finding of the master, which has been approved by the chancellor, is prima facie correct and will control unless some good reason appears for setting it aside. Our examination leads us to agree with the finding of the master that the evidence shows beyond reasonable doubt that plaintiff is the true owner of the notes and trust deed.

The evidence shows that William D. Martin at the time in question operated an investment company of which he was the owner, dealing in real estate, mortgages and securities; that Pearl Nelsen was a stenographer and clerk employed in his office; that Halleman was president of the Templeton Lime Company, a corporation dealing in coal and building materials; that Martin became indebted in a considerable sum to the Templeton Lime Company; that on or about October 2, 1928, the notes and trust deed here in question were

in a brief filed in behalf of the Allen and William D. Martin, as trustee, the contention is made that the finding of the master and the decree that plaintiff was the bona fide legal holder of the note and trust deed is not sustained by the evidence, and that the decree should be reversed for that reason.

The method adopted by defendants to this end is unusual in that they present an abstract containing all the evidence exposed to be favorable to defendants, contention and omitting practically all the evidence tending to disprove it. The plaintiff has, however, presented much of the omitted evidence in an additional abstract. It does not appear, however, from either abstract that the record contains all the evidence received upon this trial of the cause, and we would therefore be justified in refusing to weigh the evidence. Johnson v. Seymour, 243 Ill. App. 39, and Rule 6 of this court. However, we have examined the record and find that it contains all the evidence submitted upon the trial. We have therefore examined the evidence bearing upon this issue.

The finding of the master, which was approved by the Chancellor, is prima facie correct and will control unless some good reason appears for setting it aside. Our examination leads us to agree with the finding of the master that the evidence shows beyond reasonable doubt that plaintiff is the true owner of the note and trust deed.

The evidence shows that William D. Martin at the time in question operated an investment company of which he was the owner, dealing in real estate, mortgages and securities; that Kaufman was a stenographer and clerk employed in his office; that Hoffman was president of the Templeton Lumber Company, a corporation dealing in coal and building materials; that Martin became indebted to considerable sum to the Templeton Lumber Company; that on or about October 2, 1923, the note and trust deed here in question were

delivered by Martin to the plaintiff, as appears by a receipt of that date signed by plaintiff and written on the letter-head of William D. Martin & Co. Halleman testified that he received the trust deed and note in settlement of this indebtedness of Martin to the Templeton Lime Company, and that as a part of the same consideration he delivered to Martin, at his request, certain waivers of lien. A statement made up on the letter-head of Martin is in evidence, showing this transaction, and it appears in the additional abstract as Exhibit 19. The statement corroborates plaintiff, shows a balance due to Martin in the transaction of \$41.88 (for which plaintiff gave his check), which was deposited in the bank account of Martin and paid. This appears from the check and deposit slip, both of which are in evidence. For more than eight years thereafter plaintiff held this note and trust deed in his possession, and although Pearl Nelsen afterward took title to the property, she made no claim to plaintiff that she was the owner until the foreclosure suit was begun. On the contrary, when the loan matured in 1932 she entered into a written extension agreement with plaintiff, personally signed by her, in which she expressly acknowledges that plaintiff is the legal owner and holder of the note. She also personally executed six interest extension notes, one of which is in evidence, and five of these, according to the testimony, were paid to plaintiff. The property described in the trust deed was also known as 930 North Avers avenue. Pearl Nelsen signed two bail bonds for Martin in which she scheduled this property. In the schedule she swore that she was the owner of the premises and that this property was subject to the trust deed for \$3000 as a first lien. June 2, 1932, she executed in writing and delivered to plaintiff an assignment of rents on this property. There is other evidence, documentary and oral, tending to show

delivered by Martin to the plaintiff, as appears by a receipt of that date signed by plaintiff and written on the letter-head of William D. Martin & Co. Hallerstein testified that he received the first deed and note in settlement of this indebtedness of Martin to the Templeton Lumber Company, and that as a part of the same consideration he delivered to Martin, at his request, certain papers of lien. A statement made up on the letter-head of Martin is in evidence, showing this transaction, and it appears in the additional abstract as Exhibit 12. The statement corroborates plaintiff's shows a balance due to Martin in the transaction of \$41.88 (for which plaintiff gave his check), which was deposited in the bank account of Martin and paid. This appears from the check and deposit slip, both of which are in evidence. For more than eight years thereafter plaintiff held this note and trust deed in his possession, and although Pearl Nelson thereafter took title to the property, she made no claim to plaintiff that she was the owner until the foreclosure suit was begun. On the contrary, when the loan matured in 1932 she entered into a written extension agreement with plaintiff, personally signed by her, in which she expressly acknowledges that plaintiff is the legal owner and holder of the note. She also personally executed six interest extension notes, one of which is in evidence, and five of these, according to the testimony, were paid to plaintiff. The property described in the first deed was also known as 930 North Avenue Avenue. Pearl Nelson signed two bills of sale for Martin in which she conveyed this property. In the second she swore that she was the owner of the premises and that this property was subject to the first deed for \$3000 as a first lien. June 2, 1932, she executed in writing and delivered to plaintiff an assignment of rents on this property. There is other evidence, documentary and oral, tending to show

that Pearl Nelsen in this as in other transactions was only a dummy for Martin, that Martin was the real party in the transaction, and that plaintiff is the real owner of the note and trust deed.

The decree of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

that Pearl Nelson is also in other transactions was only a dummy
for Martin, that Martin was the real party in the transaction, and
that Martin is the real owner of the note and trust deed.
The decree of the trial court is affirmed.

APPEALS.

O'Connor, P. J., and McHenry, J., concur.

39561

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

vs.

MAX FIEGEN,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

291 I.A. 615⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Fiegen was tried in the Municipal court upon an information which charged him with the crime of unlawfully carrying concealed weapons, etc., contrary to sec. 155, chap. 38 of the Revised Statutes. He was found guilty and sentenced to the House of Correction for six months, and to pay a fine of \$50. Motions for a new trial and in arrest were denied. An appeal was prayed and allowed, with bond fixed at \$1500, in default of which the defendant was committed to jail. January 27, 1937, an order was entered directing the bailiff to deliver defendant to the superintendent of the House of Correction.

February 11, 1937, defendant filed a petition in the nature of a writ of error coram nobis, in which it was in substance averred that petitioner had no police record of any sort, that this was the first time he had been arrested, that the petitioner believed the court erred in the findings in that there was certain evidence which was not properly presented to the court, and which if it had been properly presented would have induced the court to find the petitioner and defendant not guilty.

This evidence was stated to be that petitioner was driving a truck in the city of Chicago, which truck did not have affixed upon its windshield a vehicle tag of the city of Chicago; that petitioner was stopped by one of the policemen of the city and asked about this tag; that he thereupon informed the policeman

THE PEOPLE OF THE STATE OF ILLINOIS,
 Plaintiff,

vs.

RAY FIDEL,
 Defendant.

CHIEF OF CLERK,
 COURT OF CLERKS,
 CHICAGO, ILLINOIS.

3211A-615

BY JUSTICE HARTWITT DELIVERED THE DECISION OF THE COURT.

Defendant was tried in the Municipal Court upon an information which charged him with the crime of unlawfully carrying concealed weapons, etc., contrary to sec. 12-1, Chap. 12 of the Revised Statutes. He was found guilty and sentenced to the House of Correction for six months, and to pay a fine of \$100. Motion for a new trial and in arrest were denied. An appeal was granted and allowed, with bond fixed at \$1000, in default of which the defendant was committed to jail. January 27, 1937, an order was entered directing the writ of habeas corpus to be granted to the defendant of the House of Correction.

February 11, 1937, defendant filed a petition in the nature of a writ of error corpus habita, in which it was in substance averred that petitioner had no valid ground to set aside that this was the first time he had been arrested, that the petitioner believed the court erred in the findings in that there was certain evidence which was not properly presented to the court, and which it is not being properly presented would have induced the court to find the petitioner and defendant not guilty.

This evidence was stated in the last petition was that a truck in the city of Chicago, which truck did not have a license upon its windshield a vehicle tag of the city of Chicago; that petitioner was stopped by one of the policemen of the city and asked about this tag; that he thereupon informed the policeman

that he had the same in the compartment of his truck which was on the dashboard in the extreme right-hand corner from where defendant was sitting; that defendant opened the compartment of the truck for the purpose of showing the policeman his vehicle tag, and after taking out various books, papers and other sundry articles the policeman saw the revolver in question in the back of the compartment, whereupon the policeman arrested petitioner.

The petitioner also averred that he was in the business of carting eggs to and from Wisconsin; that in the course of his employment it was necessary for him to carry large sums of money, and that for his protection against robbery he kept said revolver in the compartment in his truck; that this revolver was given to him by a policeman in Chicago for that specific purpose.

The petition avers that defendant believes that if Judge Bonelli had been advised of these facts at the time of the trial petitioner would not have been found guilty.

The petition prayed that an order might be entered directing the superintendent of the House of Correction to return petitioner before Judge Bonelli on a day certain, that leave be given petitioner to present this evidence, and further, that petitioner might be discharged.

This petition being filed on February 11, 1937, an order was entered by Judge Bonelli that defendant Fiegen be brought before him on February 16, 1937, to appear at a hearing on the petition.

Thereupon, the State's Attorney entered his motion in writing to dismiss the petition. The motion stated that the petition was brought under section 72, chap. 110, Smith-Hurd's Ill. Statutes, 1935, and was in the nature of a writ of error coram nobis and was not filed as a new civil suit; that the peti-

that he had the same in the compartment of his truck which was on the bench in the extreme right-hand corner from where defendant was sitting; that defendant opened the compartment of the truck for the purpose of showing the policeman his money bag, and after taking out various bottles, papers and other sundry articles the policeman saw the revolver in question in the back of the compartment, whereupon the policeman arrested defendant.

The petitioner also avers that he was in the business of carrying eggs to and from Wisconsin; that in the course of his employment it was necessary for him to carry large sums of money, and that for his protection against robbery he kept a revolver in the compartment in his truck; that this revolver was given to him by a policeman in Chicago for civil service purposes.

The petition avers that defendant believes that if Judge Honell had been advised of these facts at the time of the trial petitioner would not have been found guilty.

The petition prays that an order might be entered directing the superintendent of the house of correction to return petitioner before Judge Honell on a day certain, that leave be given petitioner to present his evidence, and further, that petitioner might be discharged.

This petition being filed on February 1, 1937, an order was entered by Judge Honell that defendant should be returned to him on February 1, 1937, to appear at a hearing on the petition.

In return, the State's attorney entered his motion in writing to dismiss the petition. The motion stated that the petition was brought under section 77, Chap. 110, Wisconsin Statutes, 1937, and was in the nature of a writ of error. Coram nobis and was not filed as a new civil suit; that the peti-

tion did not state facts but mere conclusions; that the alleged facts stated were known to petitioner at the time of the trial; and through his own negligence and carelessness were not presented to the court at that time, Defendant was not prevented from presenting these facts at the time of the trial either by duress, fraud, excusable mistake or ignorance; that the alleged newly discovered evidence was not ground for relief under section 72 of the Civil Practice act. The motion pointed out that the petition did not aver that the testimony of the new witnesses was not known to defendant at the time of the trial, nor did it aver that defendant had not had a full opportunity to present such testimony at the trial, nor that the testimony would show that defendant was not guilty of the charge. The motion also averred defendant did not request counsel. If he had, the court would have appointed an attorney for him, and that since he was not convicted by fraud, duress, excusable mistake or ignorance, he had lost no right guaranteed, and that the alleged facts were insufficient to give the court jurisdiction.

The petition was set for hearing on February 16, 1937, at which time defendant was produced. Whereupon, on consideration of the motion, the court granted the prayer of the petition and allowed a new trial. Defendant was arraigned, pleaded not guilty, was advised by the court as to his right to trial by jury, elected to waive such right, and the cause was submitted to the court for trial without a jury. The court, after hearing the testimony of the witnesses, found defendant not guilty, entered a judgment on the finding in favor of defendant and discharged him except as to the time he had already served. This appeal by the People is from the order granting the prayer of the petition and setting aside the judgment theretofore entered.

The procedure was formerly defective in that no order was

tion did not state facts but were conclusions; that the alleged facts stated were known to petitioner at the time of the trial; and through his own negligence and carelessness were not presented to the court at that time. Defendant was not prevented from presenting these facts at the time of the trial either by counsel, trial, excusable mistake or ignorance; that the alleged newly discovered evidence was not grounds for relief under section 781 of the Civil Practice Act. The motion pointed out that the petition did not aver that the testimony of the new witnesses was not known to defendant at the time of the trial, nor did it aver that defendant had not had a full opportunity to present such facts at the trial, nor that the testimony would show that defendant was not guilty of the charge. The motion also averred defendant did not request counsel. If he had, the court would have appointed an attorney for him, and that since he was not convicted by trial, appeal, excuse, mistake or ignorance, he had lost no right to guarantee, and that the alleged facts were insufficient to give the court jurisdiction.

The petition was set for hearing on February 13, 1937, at which time defendant was present. Defendant, in compliance with the motion, the court granted the prayer of the petition and allowed a new trial. Defendant was arraigned, pleaded not guilty, and advised by the court as to his right to trial by jury, elected to waive such right, and the case was submitted to the court for trial without a jury. The court, after hearing the testimony of the witnesses, found defendant not guilty, entered a judgment on the findings in favor of defendant and allowed him except as to the time he had already served. This appeal by the people is from the order granting the prayer of the petition and setting aside the judgment therefore entered.

The procedure was for error defective in that no order was

entered upon the motion of the State's Attorney to strike the petition. People v. Gardner, 279 Ill. App. 451. However, that motion was in effect overruled and denied by the order sustaining the motion of the petitioner granting that the prayer of his petition be granted.

The sole question for determination therefore is whether the facts averred in the petition were sufficient to justify the entry of an order setting aside the previous judgment. That question was raised by the motion of the State's Attorney to dismiss the petition. People v. Crooks, 326 Ill. 266; People v. Green, 355 Ill. 468; People v. Nakielny, 279 Ill. App. 387. The petition was in the nature of a motion substituted for the common law writ of error coram nobis, as provided by section 72 of the Civil Practice act, and is in its nature a civil proceeding, and the State, therefore, is entitled to a review of the judgment. People v. Green, 355 Ill. 468. The errors which may be corrected upon such a motion are such errors of fact as could formerly be corrected under section 89 of the Practice act.

In the recent case of People v. McArthur, 283 Ill. App. 467, this court gave consideration to the question of what facts were sufficient to justify relief in this kind of proceeding. We there said (p. 469):

"In discussing what one must show to be relieved from a conviction in a criminal case, by virtue of the provisions of sec. 89 of the old Practice Act, the court in People v. Crooks, 326 Ill. 266, said (p. 230): 'Errors of fact which may be availed of on writ of error coram nobis or under a motion made in pursuance of Section 89 of our Practice act include duress, fraud and excusable mistake.....The writ of error coram nobis, or a motion under said statute, is an appropriate remedy in criminal cases as well as in civil cases. Such a writ lies to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, and without negligence on his part, he has been deprived of a defense which he could have used at his trial and which if known to the court would have prevented a conviction, or to set aside a conviction based on a plea forced by fear of mob law or by other fear of the defendant induced by misconduct of the officers of the court or by other officers of the law in whose custody a confession was obtained by such unlawful means.'

entered upon the motion of the State's attorney to strike the petition. People v. Barker, 270 Ill. App. 2d, 197. However, that motion was in effect overruled and denied by the order sustaining the motion of the petitioner granting that the prayer of his petition be granted.

The sole question for review is whether the facts averred in the petition were sufficient to justify the entry of an order setting aside the previous judgment. That question was raised by the motion of the State's attorney to dismiss the petition. People v. Crooks, 300 Ill. 2d, 266; People v. Green, 357 Ill. App. 2d, 337. The petition was in the nature of a motion submitted for the court on law with 1 error coram nobis, as provided by section 72 of the Civil Practice Act, and as in its nature a civil proceeding, and the order, therefore, is entitled to a review on the judgment. People v. Green, 357 Ill. App. 2d, 337. The error which may be reviewed is not a technical one, but each error of fact or law is to be reviewed under section 72 of the Practice Act.

In the recent case of People v. Crooks, 300 Ill. 2d, 266, this court gave consideration to the question of what facts were sufficient to justify relief in this kind of proceeding. We there said (p. 269):

"In discussing what the facts must now be believed to be a conviction in a criminal case, by virtue of the provisions of sec. 72 of the Civil Practice Act, the court in People v. Crooks, 300 Ill. 2d, 266, said (p. 269): 'Errors of fact which may be reviewed on writ of error coram nobis or under a writ of error coram nobis, or a motion section 72 of the Civil Practice Act include, among others, errors of fact, errors of law, errors of procedure, errors of judgment, or a motion under this statute, in an order granted in criminal cases as well as in civil cases. Such a writ lies to set aside a conviction obtained by fraud or threat, or where by some extrinsic cause or ignorance of the accused, and without negligence on his part, he has been deprived of a fair trial and he would have been convicted if it had been known to the court that he was not guilty of the crime, and which it is shown to the court would have prevented a conviction or to set aside a conviction based on a plea forced by fear of law or by other fear of the defendant induced by misadvice of the officers of the court or by other officers of the law in whose custody a conviction was obtained by non-legal means.'"

The petition here does not aver any facts which would justify the court in granting the prayer of the petition. Nothing is averred in the petition from which it can be said to appear that any material fact therein averred might not, by due diligence, have been presented to the trial court upon the hearing. It is not the purpose of the proceeding in a criminal case to provide two trials as a matter of law, or to allow a defense to be presented where the failure to present it upon the first trial was a result of the negligence of the defendant. In this proceeding the court is limited to the correction of such errors as might, at common law, have been corrected by the writ of error coram nobis or writ of error coram vobis. The authorities to this effect are too numerous to require analysis. People v. Noonan, 276 Ill. 430; People v. Crooks, 326 Ill. 266; Jacobson v. Ashkinaze, 337 Ill. 141; People v. Sullivan, 339 Ill. 146; People v. Long, 346 Ill. 646; People v. McArthur, 283 Ill. App. 467.

For the reasons indicated the judgment of the trial court is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

The petition here does not aver any facts which would justify the court in granting the prayer of the petition. It is averred in the petition that which it can be said to appear that any material fact therein averred might not, by the diligence, have been presented to the trial court upon the hearing. It is not the purpose of the proceeding in a criminal case to provide for trials as a matter of law, or to allow a defense to be presented where the failure to present it upon the trial was a result of the negligence of the defendant. In this proceeding the court is limited to the correction of such errors as appear on the record, have been corrected by the trial court, or which it is of error coram vobis. The authorities in this field are too numerous to recite. People v. Jackson, 276 Ill. 430; People v. Groves, 326 Ill. 236; Jacobson v. Ashkinase, 337 Ill. 141; People v. Sullivan, 332 Ill. 144; People v. Long, 344 Ill. 262; People v. McArthur, 385 Ill. 467. For the reasons indicated the judgment of the trial court is reversed.

REVERSED.

O'Connor, P. J., and McArthur, J., concur.

39391

IN THE MATTER OF THE ESTATE OF
LORENZ STAHL, deceased.

ELSIE MEYERS and ANNA CARLSON,
Appellants,

v.

ANNA STAHL et al.,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

291 I.A. 616¹

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

November 22, 1933, Elsie Meyers and Anna Carlson, coexecutrices under the last will and testament of Lorenz Stahl, deceased, filed an inventory in the probate court which was approved on that date. Thereafter, decedent's widow, Anna Stahl, filed a petition in the probate court alleging that the inventory did not set forth a true and complete list of the assets of the estate, charging that decedent possessed various mortgages, bonds and cash moneys which had been concealed by the executrices, and asked that the probate court vacate the order approving the inventory and issue a citation against the executrices to account.

Elsie Meyer and Anna Carlson filed a written answer to the petition, averring that the inventory filed by them had been approved, and denying that deceased possessed or owned assets not included in the inventory filed by them. The petition and answer were set down for trial, and after a lengthy hearing in the probate court an order was entered, April 27, 1934, finding that the inventory theretofore filed by the executrices did not list and set forth all the assets and

33331

IN THE MATTER OF THE ESTATE OF
LOUIS STONE, deceased.

WILLIAM STONE and ANNA STONE,
Appellants,

v.

ANNA STONE et al.,
Appellees.

331 I.A. 616

APPEAL FROM CIRCUIT
COURT, CO. H. DISTRICT.

MR. JUSTICE IN CHIEF
GIVEN THE OPINION OF THE COURT.

On May 22, 1933, late Mrs. and Anna Stone, deceased, filed an inventory in the probate court which was approved on that date. Thereafter, deceased's widow, Anna Stone, filed a petition in the probate court alleging that the inventory did not set forth a true and complete list of the assets of the estate, claiming that deceased possessed various mortgages, bonds and cash moneys which had been concealed by the executors, and asked that the probate court vacate the order approving the inventory and issue a citation against the executors to account.

Late Mrs. and Anna Stone filed a written answer to the petition, averring that the inventory filed by them had been approved, and denying that deceased possessed or owned assets not included in the inventory filed by them. The petition and answer were set down for trial, and after a lengthy hearing in the probate court an order was entered, April 27, 1934, finding that the inventory theretofore filed by the executors did not list and set forth all the assets and

property of the estate, and that various principal notes and mortgage bonds, and in particular a certain "savings account in the Lake View Trust & Savings Bank of Chicago in the joint names of Lorenz Stahl and Elsie Meyers, in approximate amount of \$1,000," belonged to and were the property of said Lorenz Stahl at the time of his decease and that said assets came into the possession and control of said Elsie Meyer and Anna Carlson and should have been and should be inventoried and listed as property and assets of Lorenz Stahl, deceased. The order further provided that the approval of the inventory on November 21, 1933, be vacated and set aside, and directed the executrices to file a full, true and complete inventory of all the assets of the estate.

Thereafter, January 17, 1936, on motion of counsel for Mrs. Stahl, the widow, an order was entered in the probate court, amending the order of April 27, 1934, nunc pro tunc as of the last mentioned date, by striking out a part of said order and substituting in lieu thereof the words, "the sum of one thousand dollars (\$1,000) previously withdrawn from the savings account in the Lake View Trust and Savings Bank of Chicago." From this last order the executrices prayed an appeal to the circuit court which was allowed upon the filing and approval of a bond for \$250 in the probate court February 4, 1936. Thereafter the appeal was perfected by the certification of the transcript of record to the circuit court. Neither Anna Stahl nor any of the heirs filed their appearance in the circuit court, but on October 7, 1936, after the cause had been noticed and there reached for trial, Anna Stahl and others heirs appeared by counsel, and on oral motion obtained an order dismissing the appeal without any evidence having been presented to the circuit court. The cause was remanded to the probate court for further hearing. Elsie Meyers and Anna Carlson have prosecuted this appeal from the order thus entered. No briefs

property of the estate, and that various principal notes and mortgage bonds, and in particular a certain "savings account in the Lake View Trust & Savings Bank of Chicago in the names of Lorenz Stahl and Elsie Mayers, in approximate amount of \$1,000," belonged to and were the property of said Lorenz Stahl at the time of his decease and that said assets came into the possession and control of said Elsie Mayers and Anna Carlson and should have been and should be inventoried and listed as property and assets of Lorenz Stahl, deceased. The order further provided that the approval of the inventory on November 21, 1935, be waived and set aside, and directed the execution to file a bill, true and complete inventory of all the assets of the estate. Thereafter, January 17, 1936, on motion of counsel for Mrs. Stahl, the widow, an order was entered in the probate court, reading in order of April 27, 1936, that the same be of the last mentioned date, by striking out a part of said order and substituting in lieu thereof the words, "the sum of one thousand dollars (\$1,000) previously withdrawn from the savings account in the Lake View Trust and Savings Bank of Chicago." In this last order the court further directed an appeal to the circuit court which was allowed upon the filing and approval of a bond for \$10 in the probate court February 4, 1936. Thereafter the appeal was perfected by the execution of the transcript of record to the circuit court. Neither Mrs. Stahl nor any of the heirs filed their answers in the circuit court, but on October 7, 1936, after the cause had been noticed and there was a trial, Anna Stahl and others being appeared by counsel, and on oral motion obtained an order dismissing the appeal, without any evidence having been presented to the circuit court. The cause was remanded to the probate court for further hearing. Elsie Mayers and Anna Carlson have prosecuted this appeal from the order thus entered. No briefs

were filed on behalf of Anna Stahl or any of the appellees.

The first question that arises is whether the order of April 27, 1934, was a final, appealable order. This question arose under similar circumstances in Martin v. Martin, 170 Ill.

18. In that case the executors filed an inventory listing certain property. One of the residuary legatees filed a petition in the county court alleging that the inventory was incomplete and that the executors withheld and secreted certain assets belonging to the estate, and, as here, prayed for a citation requiring the executors to inventory the property withheld and for an additional bond. A citation issued and upon hearing the residuary legatee amended his petition. The executors answered the petition, denied the allegations thereof and averred that they were withholding no property belonging to the estate. After hearing the county court found that the various securities mentioned in the petition did not belong to the estate, but were the individual property of the executors. The residuary legatee appealed. Upon the question whether this was a final order, the Supreme court held (p. 24):

"The order found that the securities were not the property of the Estate, but were her individual property. That was the end of the proceeding and a final determination of the issue raised by the amended petition, so far as the County Court was concerned. The order was a final order, from which appeal could be taken."

In the instant proceeding the order of April 27, 1934, found that the bank account in question belonged to the decedent, and under the rule laid down in Martin v. Martin, supra, this became a final appealable order.

Because of the failure of the widow and heirs to file briefs, we are unable to ascertain what justification they would advance for dismissal of the appeal. It appears from the abstract of record, however, that some dispute arose as to the computation of time when the appeal was taken. It would seem that the time of appeal from

was filed on behalf of the appellee. The first question that arises is whether the order of April 17, 1934, was a final, appealable order. This question arises under similar circumstances in Smith v. Smith, 120 Ill. 18. In that case the executor filed an inventory listing certain property. One of the residuary legatees filed a petition in the county court alleging that the inventory was incomplete and that the executor withheld and secreted certain assets belonging to the estate, and, as here, prayed for a citation requiring the executor to inventory the property withheld and for an additional bond. A citation issued and upon hearing the residuary legatee amended his petition. The executor answered the petition, denied the allegations thereof and averred that they were untrue and that no property belonging to the estate. After hearing the county court found that the various securities mentioned in the petition did not belong to the estate, but were the individual property of the executor. The residuary legatee appealed. Upon the question whether this was a final order, the supreme court said (p. 22):

"The order found that the securities were not the property of the estate, but were the individual property of the executor. This was the end of the proceeding and a final determination of the issue raised by the amended petition, so far as the county court was concerned. The order was a final order, from which appeal could be taken."

In the instant proceeding the order of April 17, 1934, found that the bank account in question belonged to the decedent, and under the rule laid down in Smith v. Smith, supra, this became a final appealable order.

Because of the failure of the widow and heirs to file notice, we are unable to ascertain what jurisdiction they would exercise for dismissal of the appeal. It appears from the record of the case, however, that some dispute arose as to the constitutionality of the will. The appeal was taken. It would seem that the time of appeal from

the order of April 27, 1934, as amended by the order entered January 17, 1936, ought to be computed from the date of the order of amendment and not from the date of entry of the original order. It was held in In re Estate of Oscar Schroeder, deceased, on appeal of Catherine L. Fox et al. v. Henry Ehlers et al., 184 Ill. App. 40, that where an order of the probate court is entered which in effect vacates a previous order, and a new order is entered with amendments, the time for perfecting an appeal to the circuit court begins to run from the date of the second order.

Counsel for the executrices argues that the appeal from the probate court to the circuit court required a trial de novo. The statute so provides and cases interpreting the statute so hold. In Klicka v. Klicka, 105 Ill. App. 369, it was held that the section of the statute providing for a trial de novo on appeal from the probate court is substantially the same as the statute providing for appeals from judgments of justices of the peace, and that the case should be tried de novo. See, also, American Surety Co. v. Sperry, 171 Ill. App. 56, and Scanlan v. Kirby, 230 Ill. App. 505. In the last mentioned case the court said that it was not proper practice for the circuit court, on appeal, to remand a cause to the county court after a hearing in that cause, but that the circuit court having once obtained jurisdiction by appeal should retain the cause for final hearing upon the questions raised on appeal. In view of these decisions we fail to understand why the circuit court dismissed the appeal and remanded the cause to the probate court. The appeal to the circuit court presented issues of fact which should have been tried and determined by the circuit court and a final order there entered. Moreover, we are of the opinion that the circuit court should not have dismissed the appeal without first having required the widow and heirs, on whose motion the dismissal was procured, to

the order of April 27, 1934, as amended by the order entered January 17, 1935, ought to be computed from the date of the order of amendment and not from the date of entry of the original order. It was held in In re Estate of Oscar Schorger, deceased, an appeal of Gertrude L. Forster v. Henry Schorger et al., 135 Ill. App. 40, that where an order of the probate court is entered which in effect vacates a previous order, and a new order is entered with amendments, the time for perfecting an appeal to the circuit court begins to run from the date of the second order.

Counsel for the executrix argues that the appeal from the probate court to the circuit court requires a trial de novo. The statute so provides and cases interpreting the statute so hold. In Klick v. Klick, 135 Ill. App. 359, it was held that the intention of the statute providing for a trial de novo on appeal from the probate court is substantially the same as the statute providing for appeals from judgments of justices of the peace, and that the case should be tried de novo. See, also, Meridian Trust Co. v. City, 171 Ill. App. 35, and Central v. City, 230 Ill. App. 403. In the last mentioned case the court said that it was not proper for the circuit court, on appeal, to assume a new case or to conduct a trial after a hearing in that court, but that the circuit court having once obtained jurisdiction by appeal should retain the case for final hearing upon the questions raised on appeal. In view of these decisions we fail to understand why the circuit court distinguished the appeal and remanded the cause to the probate court. The appeal to the circuit court presented issues of fact which should have been tried and determined by the circuit court and a final order there entered. Moreover, we are of the opinion that the circuit court should not have dismissed the appeal without first having required the widow and heirs, on whose motion the dismissal was procured, to

file their appearances in the circuit court. Rule 12 of the circuit court provides:

"Except on motions for leave to appear by intervention or otherwise, no counsel will be permitted to address the Court in any pending matter unless already of record as representing a party in such matter."

The failure of the objecting parties to file appearances was called to the court's attention. Before the matter was heard they should have been required to file their appearances and pay the required fee.

For the reasons stated the order of the Circuit court is reversed and the cause is remanded to that court with directions to try the cause de novo and determine the issues in controversy.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

file their appearance in the circuit court. Rule 12 of the

circuit court provides:

"Except on motion for leave to appear by intervention or otherwise, no counsel will be permitted to appear in any pending matter unless already of record as representing a party in such matter."

The failure of the opposing parties to file their appearance was called to the court's attention. Before the matter was heard they should have been required to file their appearance and pay the required fee.

For the reasons stated the order of the circuit court is reversed and the cause is remanded to that court with directions to try the cause de novo and determine the issues in controversy.

ORDER REVERSED AND CAUSE REMANDED.
L. H. HENNINGSON.

Escobar and Williams, U.S. Circuit.

39405

WALTER KEMP, receiver in equity
for MIDLAND CLUB, a corporation,
Appellee,

v.

BENJAMIN H. BLACK,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

291 I.A. 616²

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Walter Kemp was appointed receiver in equity for the Midland Club June 1, 1933, in circuit court case B-269484, which was subsequently consolidated with case B-209714 in the same court. As receiver he brought suit in the municipal court against Benjamin H. Black, defendant, to recover \$98.94 on an account stated, representing dues and house account incurred by defendant from February to September, 1932. Pursuant to leave of court defendant filed a counterclaim or set-off of \$100, plus accrued interest alleged to be due on an 18-year 5% collateral gold note, No. C-462, face value \$100, purchased by defendant in 1928 and due October 1, 1946. Trial was had before the court without a jury upon stipulated facts, resulting in findings and judgment for plaintiff of \$98.94. The court also found the issue against plaintiff on defendant's counterclaim and assessed defendant's damages at \$25, being the amount of accrued interest on the gold note up to October 31, 1933, and judgment was entered accordingly. Defendant appeals.

By agreement of the parties stipulation was made as to the following facts:

33402

WALTER HARRIS, receiver in equity
for WILLIAM GRUB, a corporation,
Appellee,

v.

BENJAMIN H. BLACK,

Appellant.

ALLIED TRUST COMPANY

CHARTERED IN NEW YORK

SALE I.A. 616

MR. JUSTICE THOMAS EDWARD
DELIVERED THE OPINION OF THE COURT.

After camp was appointed receiver in equity for the
Midland Club June 1, 1933, in circuit court case B-282484,
which was subsequently consolidated with case H-282714 in the
same court. As receiver he brought suit in the municipal court
against Benjamin H. Black, defendant, to recover \$8.94 on an
account stated, representing dues and house account incurred by
defendant from February to September, 1933. Plaintiff to leave
of court defendant filed a counterclaim or set-off of \$100, plus
accrued interest alleged to be due on an 18-year \$5 collateral
gold note, No. G-462, face value \$100, purchased by defendant
in 1923 and due October 1, 1946. Trial was had before the court
without a jury upon stipulated facts, resulting in findings and
judgment for plaintiff of \$8.94. The court also found the same
against plaintiff on defendant's counterclaim and assessed defend-
ant's damages at \$2, being the amount of accrued interest on the
gold note up to October 31, 1933, and judgment was entered accord-
ingly. Defendant appeals.

By agreement of the parties stipulation was made as to the
following facts:

(1) That Walter Kemp was duly appointed receiver of the Midland Club on May 31, 1933, and qualified as such by filing his bond and was acting as receiver when suit was instituted.

(2) That defendant, who was a member of the Midland Club, admits the indebtedness sued on, as alleged in the statement of claim, aggregating \$98.94.

(3) That the defense interposed is in the nature of a set-off and payment.

(4) That some time in 1928, at the request of the Midland Club, Black purchased one eighteen-year five per cent collateral gold note, No. C 462, with interest coupons thereto attached, and paid \$100 in cash therefor.

(5) That on May 17, 1930, the Midland Club defaulted in the payment of interest; that the request for payment of the interest then due was refused and no interest has since been paid.

(6) That on the foregoing date the entire principal and interest was declared due by defendant.

(7) That pursuant to an order of the circuit court, where the receivership proceedings were pending, all creditors were requested to file their claims by a certain date; that defendant filed his claim, setting forth the collateral gold note for \$100, interest thereon from October 31, 1932, on five interest coupons for \$2.50 each, aggregating \$119.75, and that after allowing the Midland Club a credit of \$95, left a balance then due Black as a creditor of the Club in the sum of \$24.75.

The only question involved is whether Black was entitled to maintain his set-off in the municipal court against the claim of the receiver upon an indebtedness which did not mature until October 1, 1946, by its terms and which the receiver contends could not be accelerated by an individual note holder under the terms of the trust deed. The allowance of \$25 interest on the set-off for matured interest notes is not questioned by the receiver.

The collateral gold note, due October 1, 1946, which Black purchased from the Midland Club, contains the following provision:

"This note, together with accrued interest thereon, may become due and payable before its regular maturity in case of default in the payment of the principal or any interest on this or any of the notes of this issue, or in case of the default in the performance of any of the covenants or conditions of said trust indenture in the manner and with the effect and under the conditions provided in said trust indenture."

The trust deed provides:

(1) That after Kemp was duly appointed receiver of the Midland Club on May 31, 1933, and qualified as such by filing his bond and was acting as receiver when suit was instituted.

(2) That defendant, who was a member of the Midland Club, admits the indebtedness and on, as alleged in the statement of claim, aggregating \$28,641.

(3) That the defense interposed is in the nature of a set-off and payment.

(4) That some time in 1932, at the request of the Midland Club, Black purchased one eighteen-year five per cent collateral gold note, No. G 462, with interest coupons thereto attached, and paid 100 in cash therefor.

(5) That on May 17, 1930, the Midland Club defaulted in the payment of interest; that the request for payment of the interest then due was refused and no interest has since been paid.

(6) That on the foregoing date the entire principal and interest was declared due by defendant.

(7) That pursuant to an order of the circuit court, where the receivership proceedings were pending, all creditors were requested to file their claims by a certain date; that defendant filed his claim, setting forth the collateral gold note for \$100, interest thereon from October 31, 1932, on five interest coupons for \$2.50 each, aggregating \$12.50, and that after allowing the Midland Club a credit of \$5, left a balance then due Black as a creditor of the Club in the sum of \$4.75.

The only question involved is whether Black was entitled to

maintain his set-off in the municipal court against the claim of

the receiver upon an indebtedness which did not mature until October

1, 1946, by its terms and which the receiver contends should not be

accelerated by an individual note holder under the terms of the trust

deed. The allowance of \$25 interest on the set-off for matured in-

terest notes is not questioned by the receiver.

The collateral gold note, due October 1, 1946, which Black

purchased from the Midland Club, contains the following provision:

"This note, together with accrued interest thereon, may become due and payable before its regular maturity in case of default in the payment of the principal or any interest on this or any of the notes of this issue, or in case of the default in the performance of any of the covenants or conditions of said trust instrument in the manner and with the effect and under the conditions provided in said trust instrument."

The trust deed provides

"In case default shall be made in the due and punctual payment of any principal or interest on any of the deposited collateral the Trustee shall not take notice thereof or take any action or begin any suit or proceedings at law or in chancery for the collection of any money due or in default thereunder, unless and until requested in writing so to do by the President or Treasurer of the Club, in pursuance of a resolution of its Board of Directors or upon the written request of the holder or holders, owner or owners of at least seventy five per cent (75%) in amount of all the then outstanding notes of the Club, issued and certified hereunder."

Article VIII, section 1 of the trust deed provides:

"In case default shall be made in the due and punctual payment of the interest or principal of any note issued by the Club, hereunder and certified by the Trustee, according to its tenor, and after such default shall have continued for a period of sixty (60) days, or in case default shall be made in the due observance or performance of any other covenant or condition herein to be kept or observed by the Club, and in case such last mentioned default shall have continued for ninety (90) days after notice thereof from the Trustee, delivered or mailed to the Club at 168 West Adams St., Chicago, Illinois, then and in every such case the Trustee, upon written request of the holder or holders, owner or owners of at least seventy-five (75%) per cent in amount of the notes of the Club issued in pursuance hereof, then outstanding, shall by notice in writing deliver or mail to the corporation as aforesaid, declare the principal of all of the notes of the club then outstanding under this indenture and not already matured by their terms, to be due and payable immediately, without further notice, and upon any such declaration all of the said notes of the Club shall become and be immediately due and payable anything in this indenture or in said notes of the Club contained to the contrary notwithstanding; ***."

It is conceded, of course, under the stipulation of the parties that Black requested interest payments on May 17, 1930, and then and there declared the entire principal and interest due under the terms of the note and trust deed. Nevertheless, the question arises whether this declaration on the part of Black could operate as an acceleration of the indebtedness under the terms of the trust deed. Although the note itself provides that the note may become due upon certain contingencies, one of which was the default in payment of interest, the acceleration of the principal note and the declaration of the entire indebtedness as due could only be made in accordance with the terms of the trust deed, which plainly provides that the right to mature the bonds prior to their due date was vested in the trustee, who could act only upon the written request of the

"In case default shall be made in the due and punctual payment of any principal or interest on any of the debentures, the Trustee shall not take notice thereof or take any action or be in any way or proceedings at law or in equity for the collection of any money due or to be by the Trustee or less and until repaid in full, so to do by the Trustee or Treasurer of the Club, in pursuance of a resolution of its Board of Directors or upon the written request of the holder or holders, owner or owners of at least seventy-five per cent (75%) in amount of all the then outstanding notes of the Club, issued and certified hereunder."

Article VIII, section 1 of the trust deed provides:

"In case default shall be made in the due and punctual payment of the interest or principal of any note issued by the Club, hereunder and certified by the Trustee, according to the terms, and for such default shall have continued for a period of thirty (30) days, or in case default shall be made in the due and punctual payment of any other covenant or condition herein to be kept or observed by the Club, and in case such default mentioned default shall have continued for ninety (90) days after notice thereof has been delivered or mailed to the Club at its last known address in Chicago, Illinois, then and in every such case the Trustee, upon written request of the holder or holders, owner or owners of at least seventy-five (75%) per cent in amount of the notes of the Club issued in pursuance hereof, then and after notice in writing deliver or mail to the corporation or otherwise, declare the principal of all of the notes of the Club then outstanding under this indenture and not already matured by their terms, to be due and payable immediately, without further notice, and upon any such declaration all of the said notes of the Club shall become and be immediately due and payable whether in this indenture or in said notes of the Club contained in the company's records or not."

It is conceded, of course, under the stipulation of the parties that Black requested interest payments on May 15, 1930, and that there existed the entire principal and interest due under the terms of the note and trust deed. The question arises whether this declaration on the part of Black could operate as an acceleration of the indebtedness under the terms of the trust deed. Although the note itself provides that the note may become due upon certain contingencies, one of which was the default in payment of interest, the acceleration of the principal note and the declaration of the entire indebtedness as due could only be made in accordance with the terms of the trust deed, which itself provides that the right to mature the bonds prior to their due date was vested in the Trustee, who could act only upon the written request of the

holders and owners of at least 75% of the amount of the notes outstanding. This would seem to preclude any declaration by any bondholder to accelerate the payment of principal due on his individual bond. It would therefore follow that the note, which by its terms became due in 1946, could not earlier become due by acceleration of the defendant, nor could he bring an action at law upon the note until it had been regularly matured.

The law is well settled that no right to a set-off exists on an immature claim as against a matured indebtedness. It was so held in Ellis v. Cothram, 117 Ill. 458, where the court held that defendant's claim or demand, set up in his plea of set-off, were not due at the time the action was brought, and hence no judgment could properly be rendered thereon. The court said (p. 460):

"If the defendant's demands were not due at the time plaintiffs brought their action, he could not recover upon them. In pleading a set-off, the defendant assumes the position of a plaintiff, and is required to prove the same facts which he would be required to prove if he had brought an original action on his demand. (Kelly v. Garrett, 1 Gilm. 649.)"

Jones v. Adams, 81 Ill. App. 183, is to the same effect.

It is argued, however, that article VII and section 1 of article VIII of the trust deed do not apply in cases of insolvency and the appointment of a receiver, because those provisions of the trust deed deal with the Midland Club as a going institution, and nothing therein contained provides for the contingency of insolvency or receivership; that in view of the insolvency of the club there was no one acting as trustee, and no application could be made for acceleration of the principal indebtedness. It is elementary, however, that courts of equity have jurisdiction of all trusts and may upon the failure of the trustee or his successor in trust to act appoint a successor to perform the duties of the trustee upon the application of any of the beneficiaries of the trust. (In re

holders and owners of at least 75% of the amount of the notes out-
standing. This would seem to preclude any objection by any
holder to accelerate the payment of principal due on his in-
dividual bond. It would therefore follow that the notes, which
by their terms became due in 1946, could not earlier become due by
acceleration of the debenture, nor could he bring an action at
law upon the notes until it had been previously matured.
The law is well settled that no right to a set-off exists
in an instrument of this nature as against a matured instrument. It was so
held in Wells v. Coughlin, 114 Ill. 488, where the court held that
debentures, claims or demands, set up in this case of set-off, were
not due at the time the action was brought, and hence no judgment
could properly be rendered thereon. The court said (p. 490):
"if the defendant's demands were not due at the time plain-
tiff brought their action, he could not recover upon them. In
placing a set-off, the defendant assumes the burden of proving
that, and is required to prove the facts which would be re-
quired to prove it. He has failed to do so in this case."
(Wells v. Coughlin, 114 Ill. 488.)

Johnson v. Johnson, 114 Ill. 490, 115, is to the same effect.

It is argued, however, that articles VII and section 1 of
article VIII of the trust deed do not apply in cases of involuntary
and the appointment of a receiver, because those provisions of the
trust deed deal with the defendant's job as a going institution, and
nothing therein contained provided for the continuation of involun-
tary or receivership; that in view of the insolvency of the ship
there was no one acting as trustee, and no application could be
made for acceleration of the principal debentures. It is argu-
able, however, that courts of equity have jurisdiction of all trusts
and may upon the failure of the trustee or his executor in trust to
appoint a receiver to perform the duties of the trustee upon
the application of any of the beneficiaries of the trust. (In re

Estate of Beckwith v. Cooper, 258 Ill. App. 411; 1 Perry, Law of Trusts and Trustees [7th ed.] pp. 270, 484 and 508.) The want of a trustee, or his failure to act and perform the duties imposed upon him, will not vitiate the trust; a successor may be appointed upon the proper application to a court of equity.

Defendant's claim for setoff was of a purely equitable nature, and it is urged by defendant that, under rule 86, par. 5, Revised Civil Practice Rules of the Municipal court of Chicago, in force November 1, 1936, that court has jurisdiction to hear counterclaims of an equitable nature. Although the stipulated facts show that Walter Kemp was appointed receiver of the Midland Club and qualified as such by filing his bond and acting as receiver when suit was instituted, there is no showing that the claim against the Midland Club which Black filed in the circuit court would not have been paid, "nor of any special equity requiring the setoff to be made." (Downs v. Jackson, 33 Ill. 464.) Without deeming it necessary to pass upon the contention raised by defendant that the municipal court may by rule confer equitable jurisdiction upon itself, we hold that defendant's claim of setoff does not warrant the interference of equity, even if such jurisdiction existed in the municipal court, because no special equity is shown (Citizen's Trust & Savings Bank v. Blair, 259 Ill. App. 294) and also because there are no circumstances "from which it can be inferred that one debt was contracted on the faith of the other." (Tate v. Evans, 54 Ala. 16; 2 Story's Equity Jurisprudence, secs. 1436, 1436a and 1437.) For these reasons we are of the opinion that the municipal court properly disallowed the setoff, except as to the items of interest which had matured, and judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Seanlan and Sullivan, JJ., concur.

Estate of Jackson v. Goody, 203 Ill. App. 411; 1 Perry, 140
of trusts and trustees [Vol. 44, pp. 270, 281 and 282.] The want
of a trustee, or the failure to act and perform the duties imposed
upon him, will not vitiate the trust; a successor may be appointed
upon the proper application to a court of equity.
Defendant's claim for estate was of a purely equitable
nature, and it is urged by defendant that, under Rule 80, par. 2,
Revised Civil Practice Rules of the Municipal Court of Chicago,
in force November 1, 1933, that court has jurisdiction to hear
counterclaims of an equitable nature. Although the defendant
facts show that after Lamp was appointed receiver of the Chicago
Club and qualified as such by filing his bond and making an as-
sessment when suit was instituted, there is no showing that an action
against the Chicago Club which Lamp filed in the circuit court
would not have been held, "not of any special equity relating to
estate to be made." (Horne v. Jackson, 23 Ill. App. 411.)
Defendant it necessary to pass upon the contention raised by defendant
and that the municipal court may by its counter equitable jurisdiction
then upon itself, we hold that defendant's claim of estate does not
warrant the interference of equity, even if some jurisdiction existed
in the municipal court, because no special equity is shown (Horne v.
Jackson, 23 Ill. App. 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.)
For these reasons we are of the opinion that the municipal court
properly dismissed the matter, except as to the item of interest
which has matured, and judgment is therefore affirmed.
JUDGMENT AFFIRMED.
Reagan and Sullivan, J.J., concur.

39554

THE AMERICAN RUSSIAN BROTHERHOOD
AND SISTERHOOD, a corporation,
Appellee,

v.

VASILIJ W. SKLAR and SOFIA SKLAR,
his wife, et al.,
Defendants below.

ON APPEAL OF VASILIJ W. SKLAR and
SOFIA SKLAR,
Appellants.

55A
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

291 I.A. 616³

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

August 31, 1935, plaintiff, The American Russian Brotherhood and Sisterhood, a corporation, filed a bill to foreclose a trust deed secured by note in the principal sum of \$4,000, executed by Vasilij W. Sklar and Sofia Sklar, defendants, husband and wife. Appearance and answer were duly filed by defendants, the cause was referred to a master, and April 3, 1936, a decree of foreclosure was entered. Thereafter, April 3, 1936, defendants filed their sworn petition for leave to file a petition in the nature of a bill of review based upon newly discovered evidence, to which plaintiff duly filed its answer. The petition was subsequently amended, December 24, 1936, and when the matter came up for hearing before the chancellor, January 11, 1937, an order was entered denying defendants leave to file their complaint in the nature of a bill of review, and this appeal followed.

The principal question presented is whether the allegations

32004

THE AMERICAN LEGATION IN THE DISTRICT OF COLUMBIA
AND DISTRICT OF COLUMBIA, a corporation,
Appellee.

v.

VASILIS W. SKLAR and SOFIA SKLAR,
his wife, et al.,
Appellants below.

ON APPEAL OF VASILIS W. SKLAR and
SOFIA SKLAR,
Appellants.

MR. JAMES H. HARRIS, JR.,
Counsel for Appellants.

August 22, 1936, Plaintiff, The American Legation, District of Columbia, filed a bill to foreclose a

trust deed secured by note in the principal sum of \$1,000, executed by Vasilis W. Sklar and Sofia Sklar, defendants, husband and wife. Appearance and answer were duly filed by defendants, the same was referred to a master, and April 1, 1936, a decree of foreclosure was entered. Thereafter, April 5, 1936, defendants filed their sworn petition for leave to file a petition in the nature of a bill of review based upon newly discovered evidence, to which Plaintiff duly filed its answer. The petition was summarily granted, December 24, 1936, and when the matter came up for hearing before the Chancellor, January 11, 1937, an order was entered granting defendants leave to file their complaint in the nature of a bill of review, and this appeal followed.

The principal question presented is whether the allegations

THE AMERICAN LEGATION
DISTRICT OF COLUMBIA

2211.A.616

of the sworn amended petition, predicated upon newly discovered evidence, were sufficient to justify the court in allowing the petition, challenging the validity of the decree, to be filed. It appears from the amended petition that plaintiff was organized under the laws of Illinois October 31, 1918, as a corporation not for profit; that its articles of incorporation conferred upon it the powers of "rendering mutual and material assistance to its members and their families, in case of accident, sickness and death;" that the act concerning corporations under which plaintiff was incorporated was amended June 27, 1927, so as to provide that all mutual associations "heretofore incorporated under the provisions of this act, shall not, after this act becomes effective, engage in such business other than that they may retain their corporate existence six months for the sole purpose of winding up their business or reincorporating under some act, the enforcement of which comes within the jurisdiction of the Department of Trade and Commerce of this State;" that plaintiff failed and refused to reincorporate as directed by the amended statute, but continued to act as a mutual benefit association, and on October 7, 1927, made the loan in question to defendants, in the sum of \$4,000, payable in five years, which was subsequently extended by agreement of the parties after maturity and ultimately resulted in the foreclosure decree and sale. The amended petition alleges that defendants, for the first time on November 6, 1936, learned of the newly discovered evidence, namely, that plaintiff did not legally exist on October 7, 1927, the date of the trust deed and notes, but had been dissolved by law on July 1, 1927, and as a result thereof could not legally maintain any suit or action in this cause after July 1, 1927, when the amended statute became effective; that the new matters constituted a good defense to the original complaint,

of the two amended petitions, presented upon newly discovered evidence, were sufficient to justify the court in allowing the petition, annulling the validity of the decree, to be filed. It appears from the amended petition that the plaintiff was organized under the laws of Illinois October 22, 1927, as a corporation not for profit; that the articles of incorporation contained therein the power of "transferring, leasing and mortgaging real estate to its members and their families, in case of death, sickness and disability;" that the said corporation was organized under Illinois law was incorporated was limited July 27, 1927, so as to provide that all mutual associations "hereinafter incorporated under the provisions of this act, shall not, after they have become effective, engage in such business other than that they may retain their corporate existence and continue for the said purpose of said act, their business or transacting under said act, the maintenance of which comes within the jurisdiction of the Department of Labor and Commerce of this State;" that plaintiff failed to comply with the requirements as directed by the amended act, but continued to act as a mutual benefit association, and on October 7, 1927, made the then in question to determine, in the sum of \$100,000 payable in five years, which was accordingly extended by agreement of the parties to the act and ultimately resulted in the liquidation of the said. The amended petition alleges that the decree was made, for the first time on November 6, 1927, based on the newly discovered evidence, namely, that plaintiff did not legally exist on October 7, 1927, the date of the first deed and note, but had been dissolved by law on July 1, 1927, and as a result thereof could not legally maintain any suit or action in this cause after July 1, 1927, when the amended petition became effective; that the new statute constituted a good defense to the original complaint.

and had the court known **thereof** at the time of the entry of the decree, it would not have entered the same but would have dismissed the complaint for want of equity. The amended petition prayed that the decree and all proceedings in the foreclosure suit be reviewed, that the suit be dismissed and that the note for \$4,000 and the trust deed securing it be declared null and void.

It has generally been held that a bill of review may be filed: (1) for error appearing on the face of the record; (2) for newly discovered evidence; and (3) for fraud impeaching the original transaction. The amended petition falls within the second class. In order to sustain a bill of this character, predicated upon newly discovered evidence, it must appear that the evidence was not available when the original proceeding was heard, and that by reasonable diligence it could not have been discovered before the entry of the decree. This rule is well stated in Lewis v. Topolice, 201 Ill. 320, wherein the court, commenting upon the allegations contained in the petition filed, said (pp. 337, 338):

"It is an absolute requisite that it shall appear from the bill, or an affidavit accompanying the same, that the newly discovered evidence was in fact newly discovered, and that it was such evidence that could not, by the exercise of reasonable diligence, have been discovered and used before the publication of the original decree. And upon this question of diligence a mere declaration or allegation of the plaintiff in error, in his bill, that the same could not have been discovered by the exercise of reasonable diligence is not sufficient, but he must state facts and circumstances from which the court may see that he has exercised reasonable diligence, and that, notwithstanding the exercise of such diligence, he was unable to procure and produce to the court the evidence upon which he relies for a review, in time to have been of use at the original hearing or before publication of the original decree." (Italics ours.)

In Corbly v. Corbly, 304 Ill. 323, in discussing this character of proceeding, the court said:

"The bill of review for newly discovered evidence is not favored by the courts. Its allowance is not a matter of right in the party but rests in the sound discretion of the court, to be exercised cautiously and sparingly, and only under circumstances that demonstrate it to be indispensable to the merits and justice of the cause."

and had the same known thereof at the time of the entry of the
decree, it could not have asserted the same but would have admitted
the complaint for want of equity. The amended petition being filed first
the decree and all proceedings in the case would have been reversed,
that the suit be dismissed and that the costs be paid by the plaintiff
and that the decree be deemed to be null and void.

It has been held that a bill of review may be
filed: (1) for error appearing on the face of the decree; (2) for
newly discovered evidence; and (3) for fraud influencing the original
transaction. The amended petition falls within the second class.
In order to sustain a bill of this character, petitioner must newly
discovered evidence, it must appear that the evidence was not
able when the original proceeding was heard, and that by reasonable
diligence it could not have been discovered before the entry of the
decree. This rule is well stated in Woods v. Tobacco, 27 Ill. 252,
wherein the court, commenting upon the effect of the rule, stated in the
petition filed, said (pp. 252, 253):

"It is a well settled rule that a bill of review may be
filed, or an affidavit accompanying the same, that the newly discovered
evidence was not known to the petitioner at the time of the entry of the
decree, that could not, by the exercise of reasonable diligence, have
been discovered at that time, and that the bill of review is the proper
remedy. And upon this point of diligence a more liberal ex-
planation of the bill will be given in this bill, than in a
bill not accompanied by the exercise of reasonable diligence.
The bill is not a bill of review, but a bill of review, and the
court will not grant it unless the petitioner shows that he has exercised
due diligence to discover the evidence, and that the evidence was not
known to him at the time of the entry of the decree, and that by
reasonable diligence it could not have been discovered before the entry
of the decree. In the case of Woods v. Tobacco, the court held that
the bill was not a bill of review, but a bill of review, and the
court will not grant it unless the petitioner shows that he has exercised
due diligence to discover the evidence, and that the evidence was not
known to him at the time of the entry of the decree, and that by
reasonable diligence it could not have been discovered before the entry
of the decree." (Italics ours.)

In Griffin v. Taylor, 37 Ill. 252, in discussing this question
of procedure, the court said:
"The bill of review for newly discovered evidence is not
favored by the courts. The allowance is not a matter of right in
the party but rests in the sound discretion of the court, so be
cause certain facts and circumstances, and only under circumstances
that entitle it to be indulged in by the parties and justice
of the cause."

Upon an examination of the amended petition we find no facts alleged from which it appears that the evidence in question could not, by the exercise of reasonable diligence, have been discovered and used before the entry of the decree. The newly discovered evidence did not consist of facts but related to the amendment of a statute forbidding mutual associations theretofore incorporated under the provisions of the original statute enacted in 1872, from engaging in business after the amendment, and permitting them to retain their corporate existence for a period of six months for the sole purpose of winding up their business or reincorporating under some other act. No case is cited to sustain the contention that the discovery of an amendment to an existing statute some nine years after the amendment became effective comes within the purview of newly discovered evidence. The exercise of reasonable diligence would have apprised defendants of plaintiff's legal status, and the mere allegation that they did not know of the amendment and could not by reasonable diligence have discovered it is inconsistent with the reasonable supposition that even a cursory examination would have disclosed the enactment of the legislature in 1927.

Considerable space is devoted in defendants' briefs to a discussion of the matter of when bills of review may be allowed and the exercise of powers vested in corporations organized not for profit, but these questions are beside the point. We are of the opinion that the petition in this case did not meet any of the requirements laid down by the authorities, and that upon the face of the amended petition the court was justified in refusing to allow defendants to file the petition in the nature of a bill of review.

In support of the order or decree, plaintiff makes the additional point that the corporate existence of plaintiff cannot be collaterally attacked by defendants. In view of our conclusion as

Upon an examination of the amended petition we find no facts alleged from which it appears that the evidence in question could not, by the exercise of reasonable diligence, have been discovered and used within the time of the decree. The newly discovered evidence did not consist of facts but related to the amendment of a future formulating general instructions therefor incorporated under the provisions of the original statute enacted in 1887, from enacting in dual means after the amendment, and permitting them to retain their corporate existence for a period of six months for the sole purpose of winding up their business or reorganizing under some other act. No case is cited to establish the contention that the time of an amendment to an existing statute runs from the date of the amendment to the effective date within the period of newly discovered evidence. The exercise of reasonable diligence would have required defendants of plaintiff's legal advice, and the mere allegation that they did not know of the amendment and could not by reasonable diligence have ascertained it is inconsistent with the reasonable expectation that even a cursory examination would have disclosed the amendment of the law in 1887.

Consequently since it is not in defendants' power to a discussion of the matter of when time of review may be allowed and the exercise of power vests in corporations organized not for profit, but whose business was to be the profit, the law of the opinion that the petition in this case did not wait and of the amendments laid down by the amendments, and that upon the face of the amended petition we find the petition in relation to allow defendants to file the petition in the matter of a bill of review.

In support of the order of decree, plaintiff makes the additional point that the corporate existence of plaintiff cannot be collectively attacked by defendants. In view of our conclusion as

to the sufficiency of the petition, we deem it unnecessary to discuss this question.

The order or decree of the circuit court is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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to the Ministry of the Interior, we have no intention of

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

CONTENTS

RECEIVED JUL 27 1967

39583

PEOPLE OF THE STATE OF
ILLINOIS,

Appellee,

v.

DAN MILLER,

Appellant.

APPEAL FROM CRIMINAL
COURT, COOK COUNTY.

291 I.A. 616⁴

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Dan Miller, defendant, appeals from an order of the criminal court whereby he was adjudged guilty of contempt and sentenced to confinement in the county jail for a term of six months.

The information presented by Thomas J. Courtney, state's attorney of Cook county, charged in substance that during the trial of an indictment against Frank V. Zintak, before Judge Benjamin P. Epstein of the criminal court, beginning on January 25, 1937, defendant, a duly authorized deputy sheriff, and three other deputies were assigned by the court to take charge of the jury; that they were required by oath to keep the jurors together and not permit anyone to speak to them; that the jurors were provided with special and separate living, sleeping and eating quarters in the administration building adjacent to the criminal court building during the pendency of the trial; that on divers dates throughout the hearing of said cause intoxicating liquors, beer and whisky were brought to the jurors' quarters in the administration building after the court sessions; that Saturday,

33383

PEOPLE OF THE STATE OF
ILLINOIS,

Appellee,

v.

IAN MILLER,

Appellant.

APPEAL FROM CRIMINAL

COURT, COOK COUNTY.

2011.A.616

MR. BENJAMIN L. SPATHE, JUDGE
DELIVERED THE OPINION OF THE COURT.

Ian Miller, defendant, appeals from an order of the
criminal court whereby he was adjudged guilty of contempt and
sentenced to confinement in the county jail for a term of six
months.
The information presented by Richard J. Courtney, state's
attorney of Cook county, charged in substance that during the
trial of an indictment against Frank V. Kintz, before Judge
Benjamin L. Spathe of the criminal court, beginning on January
25, 1937, defendant, a duly authorized deputy sheriff, and three
other deputies were assigned by the court to take charge of the
jury; that they were required by each to keep the jurors together
and not permit anyone to speak to them; that the jurors were
provided with special in separate living, sleeping and eating
quarters in the administration building adjacent to the criminal
court building during the pendency of the trial; that on diverse
dates throughout the hearing of said cause introducing liquor,
beer and whiskey were brought to the jurors' quarters in the
administration building after the court recessed; that Saturday,

January 30, 1937, in the forenoon, the twelve jurors, accompanied by defendant as deputy sheriff and bailiff, entered two public drinking places where they drank several glasses of beer at the bar in the presence of members of the public; that January 30, 1937, at about ten p.m., the twelve jurors left their quarters in the administration building in charge of defendant, and went to a public drinking place and tavern on 26th street near Kedzie avenue, in Chicago, and in the presence of a great number of other persons engaged in drinking and dancing and mingled with the patrons generally and talked to them, and that the jurors separated and did not remain together and so continued to conduct themselves for a period of upward of two hours until after midnight, when they returned to their jury quarters; that Sunday, January 31, 1937, the jurors, in the company of defendant, were by leave of court granted permission to go for a bus ride; that each of the jurors and defendant knew that such permission did not authorize them to use the bus as a conveyance for making a round of taverns; that nevertheless they left the administration building at about two p.m. in a bus provided for them and were conveyed to five different taverns, in each of which the jurors stood at a public bar in the presence of members of the public and drank beer, and in at least one of said places played slot machines, and in several of said places did not remain together but separated and purchased quantities of beer and whisky which were carried back with them to their jury quarters; that in one of said places the jurors engaged in noisy and disorderly conduct and in several places announced themselves as the "Zintak jury"; that in one of the taverns a juror switched off the electric lights and in another a bar stool was taken from the premises by a juror and carried under his overcoat; that several of the jurors became intoxicated during the trip and that

January 30, 1937, in the forenoon, the twelve jurors, accompanied by defendant as deputy sheriff and bailiff, entered the public drinking places where they drank several glasses of beer at the bar in the presence of members of the public; that January 30, 1937, at about ten p.m., the twelve jurors left their quarters in the administration building in charge of defendant, and went to a public drinking place and tavern on both west and north avenues, in Chicago, and in the presence of a great number of other persons engaged in drinking and dancing and mingled with the persons generally and talked to them, and that the jurors separated and did not remain together and so continued to conduct themselves for a period of upward of two hours until after midnight, when they returned to their jury quarters; that Sunday, January 31, 1937, the jurors, in the company of defendant, were by leave of court granted permission to go for a ride; that each of the jurors and defendant knew that such permission did not authorize them to use the bus as a conveyance for making a round of taverns; that nevertheless they left the administration building at about two p.m. in a bus provided for them and were conveyed to five different taverns, in each of which the jurors stood at a public bar in the presence of members of the public and drank beer, and in at least one of said places played slot machines, and in several of said places did not remain together but separated and purchased quantities of beer and whisky which were carried back with them to their jury quarters; that in one of said places the jurors engaged in noisy and disorderly conduct and in several places announced themselves as the "Irish Jury"; that in one of the taverns a juror switched off the electric lights and in another a juror took from the premises by a juror and carried under his overcoat; that several of the jurors became intoxicated during the trip and that

upon return to their quarters they consumed beer and whisky which they had brought with them from the various taverns. The information further alleged that the jurors, well knowing that such conduct on their part was wrongful and improper, entered into an agreement and understanding among themselves and with defendant to withhold knowledge of their conduct from the trial judge by remaining silent concerning their acts and doings; that one of the taverns visited by the jurors on Sunday, January 31, 1937, was owned and operated by one Bruns, an uncle of one of the jurors, and that said place was visited at the suggestion and request of juror Bruns, and that while there juror Bruns spoke with his uncle and his mother, and other jurors were permitted to separate in said tavern and mingle with members of the public; that on the same day one of the places visited was a tavern and public drinking place owned and operated by one James Farmer, who had theretofore been a defendant under indictment in the criminal court of Cook county and was well known to defendant, and that in said place the members of the jury were permitted to gamble in the presence of the public. The information prayed that the court require Miller to file his written answer and show cause why he should not be held in contempt of court.

Miller filed his sworn answer to the information April 21, 1937, admitting that the court had ordered and directed the jurors to be kept together and not to separate or speak to any person during the course of the trial. He averred that while taking the jurors for a walk they insisted upon entering several taverns and he was unable to prevent them from so doing; that during the bus ride January 31, 1937, the jurors entered several taverns on the pretext that they had to go to the lavatory and that defendant was unable to prevent them from so doing and could not control their actions and conduct; that he did not enter into any agreement or understanding with the jurors

upon return to their quarters they consumed beer and whisky which they had brought with them from the various taverns. The information further alleged that the jurors, well knowing that such conduct on their part was wrongful and improper, entered into an agreement and understanding among themselves and with defendant to abstain from

knowledge of their conduct from the trial judge by remaining silent concerning their acts and omissions; that one of the jurors visited by the jurors on January 31, 1937, was owned and operated by one Burns, an uncle of one of the jurors, and that said juror visited at the suggestion and request of James Burns, and that there James Burns spoke with his uncle and his mother, and other jurors were permitted to express in said tavern and in the company of the public; that on the same day one of the jurors visited was a tavern and public drinking place owned and operated by one James Burns, who had theretofore been a defendant under indictment in the criminal court of Cook County and was well known to defendant, and that in said place the members of the jury were permitted to gamble in the presence of the public. The information prayed that the court require Miller to file his written answer and show cause why he should not be held in contempt of court.

Miller filed his sworn answer to the information on July 21, 1937, admitting that the court had ordered and directed the jurors to be kept together and not to converse or speak to any person outside the course of the trial. He asserted that while taking the jurors for a walk they insisted upon entering several taverns and he was unable to prevent them from so doing; that during the day on January 31, 1937, the jurors entered several taverns on the pretext that they had to go to the lavatory and that defendant was unable to prevent them from so doing and could not control their actions and conduct; that he did not enter into any agreement or understanding with the jurors

to withhold such knowledge of their conduct from the court; and that he had always conducted himself in an honorable manner and did well and truly perform his duties as an officer of the court, and did not intend to do any act which would bring disgrace, disrepute or reflect upon the dignity of the court.

It is first urged that contemnor cannot be guilty of contempt where he is not responsible for the acts committed by others. His counsel argues that in cases extending over a long period of time, where the jurors are confined and occasionally taken for a walk, ride or to a theatre, it is impossible to prevent them from talking to others than their fellow jurors and the bailiffs. This argument is not convincing, for if it were true the very purpose of locking up a jury during a trial would be an idle gesture. If, as defendant contends, the jurors insisted upon entering public taverns without his permission, mingled with the public, and that he could not prevent them from so doing, it was his duty as an officer of the court to report these circumstances to the court forthwith and not wait until the matter was called to the court's attention long after the occurrence on an information filed by the state's attorney. The deputy sheriff and bailiff in charge of the jury was an officer of the court, sworn to keep the jurors together and not to permit them to talk to outsiders or to permit outsiders to talk to them, and in the performance of his duties it was of the highest importance for the proper administration of justice that he exercise the utmost fidelity in carrying out his trust. If the jurors violated his instructions it was incumbent upon him to report their misconduct to the court at the first opportunity. The circumstances of this case, as disclosed both by the charge and the answer thereto, show that the conduct of the contemnor was so deliberate as to constitute a gross contempt for the court and its order.

to withhold such knowledge of what is coming from the court; and that he had always conducted himself in an honest manner and did well and truly perform his duties as an officer of the court, and did not intend to do any act which would bring disrepute or reflect upon the dignity of the court.

It is first urged that no person cannot be guilty of contempt when he is not responsible for the acts committed by others.

His counsel argues that in cases extending over a long period of time, where the jurors are confined and occasionally taken from walk, ride or to a theatre, it is impossible to prevent them from talking to others than their fellow jurors and the sheriff. This argument is not convincing, for if it were true the very purpose of looking up a jury during a trial could be an idle gesture. It is as

defendant contends, the jurors are placed upon entering public taverns without his permission, mingled with the public, and that he could not prevent them from so doing. It is his duty as an officer of the court to report these circumstances to the court for its consideration and not

wait until the matter was called to the court's attention from without. The occurrence on an information filed by the state's attorney. The deputy sheriff and a witness in charge of the jury was an officer of

the court, sworn to keep the jurors together and not to permit them to talk to outsiders or to permit outsiders to talk to them, and in the performance of his duties it was of the highest importance for

the proper administration of justice that he exercise the utmost fidelity in carrying out his trust. If the jurors violated his

instructions it was incumbent upon him to report them forthwith to the court at the first opportunity. The circumstances of this case, as disclosed both by the charge and the answer thereto, show that

the conduct of the defendant was so deliberate as to constitute a contempt of the court and his order.

It is next urged that because the matters charged did not occur in the presence of the court defendant's answer is sufficient to purge him. People v. Whitlow, 357 Ill. 34, is cited to support defendant's position. In that case, however, no complaint in writing was filed, nor was the contemnor afforded an opportunity to answer or explain his conduct. In this case an information was duly filed by the state's attorney and defendant was ruled to show cause why he should not be punished for contempt. He filed his answer wherein he admitted ordering beer to be brought the jurors in their quarters, admitted that the jurors while in his charge entered a public tavern at nine p.m. on January 30, 1937, and he failed to deny that the jurors separated and talked and danced with patrons of the tavern as charged. His answer admits that January 31, 1937, the jurors entered a number of taverns, drank and played slot machines therein, but he fails to deny that the jurors separated or that they brought beer and whisky back to their quarters as charged. Although defendant denies entering into an agreement or understanding with the jurors to withhold knowledge of their conduct from the court, the fact remains that he did not advise the court of the jurors' conduct on these various occasions.

Defendant's answer specifically admits that on Sunday, January 31, 1937, while at a tavern operated by an uncle of juror Bruns, said juror spoke to his relatives, ^{his} uncle and ~~and~~ mother, and that while in said place the jurors were permitted to separate. It is therefore apparent that the answer of the defendant, instead of being a denial of the charge, was in substance an acknowledgment and confession of his guilt, and fully justified the court's action in adjudging him guilty of contempt.

It is next urged that the information was defective because

It is next argued that because the matters charged did not occur in the presence of the court defendant's answer is sufficient to purge him. People v. Wilson, 307 Ill. 34, is cited to support defendant's position. In that case, however, no complaint in writing was filed, nor was the complaint afforded an opportunity to answer or explain his conduct. In this case an information was duly filed by the state's attorney and defendant was tried to show cause why he should not be punished for contempt. He filed his answer wherein he admitted occurring near to the jurors the jurors in their quarters, admitted that the jurors while in his charge entered a public tavern at nine p.m. on January 30, 1937, and he failed to deny that the jurors regarated and talked and danced with patrons of the tavern as charged. His answer admits that January 31, 1937, the jurors entered a number of taverns, drank and played slot machines therein, but he fails to deny that the jurors regarated or that they brought beer and whisky back to their quarters as charged. Defendant has denied entering into an agreement or understanding with the jurors to withhold knowledge of their conduct from the court, the last sentence of which he did not raise the count of the jurors' conduct on these various occasions. Defendant's answer specifically admits that on Sunday, January 31, 1937, while at a tavern operated by an uncle of James Bruno, said jurors spoke to his relatives, his uncle and ^{his} sister, and that while in said place the jurors were permitted to separate. It is therefore apparent that the manner of the defendant, instead of being a denial of the charge, was an admission of a violation and confession of his guilt, and fully justified the court's action in finding him guilty of contempt. It is next argued that the information was defective because

it was verified as true upon information and belief and therefore insufficient. This objection goes to the form and not to the substance of the information. It appears from the record that the point was not raised or urged in the trial court at any time. It was held in People v. Severinghaus, 313 Ill. 456, at p. 472, under similar circumstances that "it is against all rules of pleading to take advantage of such formal defect, or to permit the same to be done, after the defendant has answered the pleading and thus has confessed to its sufficiency in the matter of its allegations, where such deficiency relates merely to an informality in the matter of being verified."

Sec. 9 of Division 11 of the Criminal Code (Illinois Rev. Stats., 1937, chap. 38, par. 719) requires that all exceptions which go merely to the form of an action shall be made before trial, and that "no motion in arrest of judgment, or writ of error, shall be sustained, for any matter not affecting the real merits of the offense charged in the indictment."

It is further urged that the contemnor had no intention or design to embarrass the due administration of justice, and hence could not be guilty of contempt. It has been the rule of law from time immemorial that every man must be presumed to intend the natural and necessary consequences of his own deliberate acts. Persistence in a course of conduct is contrary to a claim of accidental conduct or want of intention. This jury was taken out on several occasions and visited many taverns, and the circumstances indicate that defendant was guilty of a course of conduct constituting neglect of duty all through the trial of the cause.

Lastly, it is contended that the information is fatally defective because it is not drawn in the name or by the authority of the People. Sec. 33 of article 6 of the constitution of the

it was verified as true upon information and belief and therefore insufficient. This objection goes to the fact and not to the substance of the information. It appears from the record that the point was not raised or urged in the trial court at any time. It was held in People v. Giovannianna, 215 Ill. 486, 84 P. 472, under similar circumstances that "it is against all rules of pleading to take advantage of such formal defect, or to permit the same to be done, after the defendant has answered the pleading and thus has confessed to its sufficiency in the matter of its allegations, where such deficiency relates merely to an informality in the matter of being verified."

Sec. 9 of Division II of the Criminal Code (Illinois Rev. Stat., 1937, chap. 38, par. 119) requires that all exceptions which go merely to the form of an action shall be made before trial, and that "no motion in arrest of judgment, or writ of error, shall be sustained, for any matter not affecting the real merits of the offense charged in the indictment."

It is further urged that the contention had no intention or design to embarrass the due administration of justice, and hence could not be a writ of contempt. It has been the rule of law from time immemorial that every man must be presumed to intend the natural and necessary consequences of his own deliberate acts. Intention in a course of conduct is a synonym for a claim of negligent conduct or want of intention. This jury was taken out on several occasions and visited many taverns, and the circumstances indicate that defendant was guilty of a course of conduct constituting neglect of duty all through the trial of the cause.

Lastly, it is contended that the information is fatally defective because it is not drawn in the name of the State of the People. Sec. 33 of Article 6 of the Constitution of the

State of Illinois provides: "All process shall run: In the name of the People of the State of Illinois; and all prosecutions shall be carried on: In the name and by the authority of the People of the State of Illinois; and conclude: Against the peace and dignity of the same." Although prosecutions are ordinarily carried on in the name of the People of the State, in contempt proceedings the object to be attained is to enforce respect for the court and its orders in the administration of justice. In passing upon the precise question here raised, the Supreme court of Illinois in People v. Jilovsky, 334 Ill. 536, at p. 538 said:

"The word 'prosecutions' as used in the constitutional provision invoked, signifies only prosecutions of a public or criminal character and concerns the formal accusation of offenders by presentment or indictment by a grand jury or by information. * * * Contempts are not crimes within the meaning of the statute defining misdemeanors * * *. The particular constitutional provision has no application to a proceeding to punish for contempt."

Again in People v. Severinghaus, 313 Ill. 456, at p. 471, the court said that it was not inclined to hold that such an information must have all the formalities of a criminal complaint filed against a defendant for a violation of the criminal law, as provided in sec. 33 of article 6 of the constitution.

We find no convincing reason for reversing the judgment of the criminal court. It is therefore affirmed.

JUDGMENT AFFIRMED.

Seanlan and Sullivan, JJ., concur.

38285

EDWIN HAMILTON,
Appellant,

v.

THOMAS J. GRADY,
Appellee.

57A
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

291 I.A. 617¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The filing of our opinion in this cause has been delayed because of bankruptcy proceedings that were pending in the United States court.

On October 10, 1934, upon an ex parte hearing, the trial court entered judgment for plaintiff in the sum of \$18,170. On November 9, 1934, defendant filed a verified motion to vacate the judgment and thereupon defendant was granted leave to plead, the judgment to stand as security. The case was tried before the court on November 28, 1934.

At the conclusion of the evidence the court entered an order, the pertinent part of which is as follows:

"And this cause being now called for trial before the Court without a jury, come the parties by their respective attorneys and issues being joined and the Court having heard the evidence for the plaintiff, it is moved by the defendant at the close of the plaintiff's case, that the Court find for the defendant on the issues under the first, second, third and fourth counts of the amended declaration, which motion is now allowed, and the Court now finds for the defendant on issues under the first, second, third and fourth counts of the amended declaration herein.

"And the Court having heard the evidence adduced by the plaintiff and the defendant on the issues under the fifth and sixth counts of the amended declaration herein, the Court finds the issues under the fifth and sixth counts for the plaintiff and assesses plaintiff's damages at the sum of \$1,500.00."

38383

EDWIN HAMILTON,
Appellant,

v.

THOMAS J. GRAY,
Appellee.

FEDERAL DISTRICT COURT,

WEST VIRGINIA.

2211 A. 317

MR. JUSTICE GEORGE DAVIS, THE CHIEF OF THE COURT.

The filing of our opinion in this case has been delayed because of numerous proceedings that were pending in the United States court.

On October 10, 1934, upon an ex parte hearing, the trial court entered judgment for plaintiff in the sum of \$18,170. On November 9, 1934, defendant filed a verified motion to vacate the judgment and thereupon defendant was granted leave to plead the judgment to stand as acquittal. The case was tried before the court on November 28, 1934.

At the conclusion of the trial the court entered an order, the pertinent part of which is as follows:

"And this cause being now called for trial before the Court without a jury, come the parties by their respective attorneys and having been joined and the Court having heard the evidence for the plaintiff, it is moved by the defendant at the close of the plaintiff's case, that the Court find the defendant on the issues moved for to be second, third and fourth counts of the amended decision, which motion is now allowed, and the Court now finds for the defendant on issues under the first, second, third and fourth counts of the amended decision herein.

"And the Court having heard the evidence adduced by the plaintiff and the defendant on the issues under the fifth and sixth counts of the amended decision herein, the Court finds the issues under the fifth and sixth counts for the plaintiff and assesses plaintiff's damages at the sum of \$1,800.00."

Plaintiff contends that "the Court erred in sustaining defendant's motion for judgment as to Counts 1, 2, 3, and 4, at the close of plaintiff's case," and in not confirming the judgment of October 10, 1934, in the sum of \$18,170.

Count 1 of plaintiff's amended declaration is based on two promissory notes, one for \$9,000, executed by William Hickey, on November 1, 1927, due three years after date, payable to the order of himself and by him indorsed; the other, for \$5,000, executed by defendant, on September 1, 1930, under the style of Thomas J. Grady, trustee, due three years after date, payable to the order of himself and by him indorsed, both notes bearing interest. Count 1 also set up a written agreement, signed by defendant, which settled the amount owed by him to plaintiff for services rendered prior to October 1, 1931, in the sum of \$13,950, and unconditionally guaranteed the payment of the two notes. Copies of the agreement and the said notes were attached to the amended declaration. The second count was based upon the \$9,000 note and the written guaranty; the third, upon the \$5,000 note and the guaranty; the fourth, upon the \$5,000 note without the written guaranty; the fifth, upon an open account claim for \$1,500 for services rendered after October 1, 1931; the sixth was for the \$1,500 claim upon an account stated. An affidavit of claim was attached to the amended declaration. To the amended declaration defendant filed five pleas. (1) That he did not promise as alleged; (2) that he did not owe as alleged; (3) that there was no consideration for the notes; (4) that he had paid the notes; and (5) alleging fraud and duress. Defendant's second amended affidavit of merits is, in substance, as follows: On October 1, 1930, plaintiff agreed to act as attorney for defendant in a certain litigation then pending and to accept as compensation the reasonable value of his services;

Plaintiff contends that "the Court erred in sustaining defendant's motion for judgment as to counts 1, 2, 3, and 4, at the close of plaintiff's case," and in not continuing the judgment of October 10, 1933, in the sum of \$1,150.

Count 1 of plaintiff's amended declaration is based on two promissory notes, one for \$2,000, executed by William Kibbey, on November 1, 1927, due three years after date, payable to the order of himself and by him indorsed; the other, for \$5,000, executed by defendant, on September 1, 1928, under the style of Thomas J. Grady, trustee, due three years after date, payable to the order of himself and by him indorsed, both notes bearing interest.

Count 1 also set up a written agreement, signed by defendant, which settled the amount owed by him to plaintiff for services rendered prior to October 1, 1931, in the sum of \$18,280, and unconditionally guaranteed the payment of the two notes, copies of the agreement and the said notes were attached to the amended declaration. The second count was based upon the \$2,000 note and the written guaranty; the third, upon the \$5,000 note and the written guaranty; the fourth, upon the \$2,000 note without the written guaranty; the fifth, upon an open account claim for \$1,000 for services rendered after October 1, 1931; the sixth was for the \$1,500 claim upon an account stated. In the fifth of claim was attached to the amended declaration. To the amended declaration defendant filed five pleas. (1) that he did not promise or obligate; (2) that he did not owe as alleged; (3) that there was no consideration for the notes; (4) that he had paid the notes; and (5) that in fraud and breach defendant's second amended affidavit of Mexico is, in substance, as follows: On October 1, 1933, plaintiff agreed to set an attorney for defendant in a certain litigation then pending and to accept as compensation the reasonable value of his services;

that defendant paid plaintiff for said services the sum of \$3,000; that the services rendered were reasonably worth no more than said sum; that defendant did not promise to pay the sums alleged in the declaration or any of them save the said \$3,000; that defendant was in the real estate business; that there was a divorce proceeding pending between him and his wife and plaintiff was acting as defendant's attorney in said proceeding; that defendant was a defendant in an equity suit wherein one Regan sought to establish a partnership between himself and defendant and to establish ownership in one-half of the properties owned by defendant; that because of this litigation defendant was unable to collect accruing payments on outstanding accounts, and as a result foreclosure suits were commenced against him; that while plaintiff was still acting as attorney for defendant, plaintiff, on October 3, 1931, came to defendant's office and there stated that he was in need of funds to prevent a foreclosure of his home and requested defendant to let him have collateral on which he might borrow the money he required; that defendant showed plaintiff the two mortgages described in the declaration and told him that he might use both or one of them, whereupon plaintiff copied descriptions of the mortgages and stated that he might borrow \$1,000 thereon and that he would serve as defendant's attorney in the said suits then pending and would thereby repay defendant all moneys plaintiff might obtain by use of the mortgages; that on October 5, 1931, plaintiff came to defendant and asked to see the mortgages, which defendant exhibited to him, and thereupon plaintiff produced a contract, which defendant now believes is the contract of guaranty described in plaintiff's amended declaration and which plaintiff asked defendant to sign; that defendant stated that plaintiff was already overpaid, whereupon plaintiff said that unless defendant signed the contract and delivered both of the mortgages to plaintiff,

that defendant paid plaintiff for said services the sum of \$1,000, that the services rendered were reasonably worth no more than \$100 and that defendant did not intend to pay the same alleged in the declaration or any of them even the said \$1,000; that defendant was in the real estate business; that there was a divorce proceeding pending between him and his wife and plaintiff was acting as defendant's attorney in said proceeding; that defendant was a defendant in an equity suit wherein one Herman sought to establish a partnership between himself and defendant and to establish a partnership one-half of the property owned by defendant; that because of this litigation defendant was unable to collect accounts receivable on outstanding accounts, and as a result foreclosure suits were commenced against him; that while plaintiff was still acting as attorney for defendant, plaintiff, on October 3, 1931, came to defendant's office and there stated that he was in need of funds to prevent a foreclosure of his home and requested defendant to let him have confidential on which he might borrow the money he required; that defendant showed plaintiff two checks were described in the declaration and told him that he might use both on one of them, whereupon plaintiff cashed descriptions of the mortgages and stated that he made borrow \$1,000 thereon and that he would serve as defendant's attorney in the said suits then pending and would thereby repay defendant all money plaintiff might receive by use of the mortgages; that on October 7, 1931, plaintiff came to defendant and asked to see the mortgages, which defendant exhibited to him, and whereupon plaintiff produced a check, which defendant now believes is the contents of said money described in plaintiff's amended declaration and which plaintiff asked defendant to sign; that defendant stated that plaintiff was already overpaid, whereupon plaintiff said that unless defendant signed the contract and delivered both of the mortgages to plaintiff,

he, plaintiff, would abandon the services of defendant and would withhold from defendant papers and documents belonging to him (which were required by defendant as exhibits in the Regan suit), and that plaintiff would jeopardize all of the said cases in which defendant was interested and would drive defendant into bankruptcy; that he would give opposing attorneys in the said cases information concerning affairs of defendant, and defendant, fearing that unless he refrained from antagonizing plaintiff and complied with his demands plaintiff would drive defendant into bankruptcy and jeopardize his interests, signed the contract and delivered the mortgages and notes to plaintiff; that immediately after the proofs were closed in the Regan suit, about August 1, 1932, defendant notified plaintiff that the contract was void and demanded that plaintiff return the mortgages and contract, which plaintiff refused to do, "and from thence hitherto [defendant] has persisted in his demand but that the plaintiff has refused to comply therewith." Plaintiff's written motion to strike the second amended affidavit of merits was overruled.

Upon the trial plaintiff, in support of counts 1, 2, 3 and 4 of his amended declaration, introduced the two promissory notes, and the written guaranty of defendant; and in support of counts 5 and 6 plaintiff introduced testimony as to the services rendered and the value of the same, and then rested his case. Thereupon defendant orally "moved to dismiss as to the counts concerned with this purported written contract." The record shows that the court then heard arguments in reference to the motion, but the argument is omitted from the record. After the close of the argument the court took the matter under advisement. Defendant then introduced evidence in support of his defense as to counts 5 and 6, but introduced no evidence in defense of counts 1, 2, 3 and 4. The judgment order followed.

he, plaintiff, would abandon the services of defendant and would withhold from defendant papers and documents belonging to him (which were retained by defendant in the German suit), and that plaintiff would jeopardize all of the said cases in which defendant was interested and would drive defendant into bankruptcy; that he would give opposing attorneys in the said cases information concerning affairs of defendant, and defendant, fearing that unless he refrained from antagonizing plaintiff, he would be compelled to drive defendant into bankruptcy and jeopardize his interests, signed the contract and delivered the mortgages and notes to plaintiff; that immediately after the proofs were closed in the German suit, about August 1, 1933, defendant notified plaintiff that the contract was void and demanded that plaintiff return the mortgages and contract, which plaintiff refused to do, "and from thence forth [defendant] has persisted in his demand that the plaintiff has refused to comply therewith." Plaintiff's motion to strike the second amended affidavit of assets was overruled.

Upon the trial plaintiff, in support of counts 1, 2, 3 and 4 of his amended declaration, introduced the two promissory notes, and the written guaranty of defendant; and in support of counts 5 and 6 plaintiff introduced testimony as to the prices received and the value of the same, and then rested his case. Thereupon defendant orally "moved to discontinue the counts concerned with this purported written contract." The court then in the court then heard arguments in reference to the motion, but the argument is omitted from the record. After the close of the argument the court took the matter under advisement. Defendant then introduced evidence in support of his defense as to counts 1 and 2, but introduced no evidence in defense of counts 3 and 4. The judgment order followed.

The parties agree that the action of the court in sustaining defendant's motion for a finding as to counts 1, 2, 3 and 4 was based upon the theory that as plaintiff's evidence showed that the matters involved in said counts arose out of the relationship of attorney and client, the burden of proof, under the law, was upon plaintiff to prove, affirmatively, good faith, absence of undue influence, adequacy, and equity as to said matters, and that as plaintiff offered no proof in that regard he failed to make out a prima facie case, under the law. Defendant contends that the trial court was justified in sustaining his motion.

In support of the action of the trial court, defendant cites Robinson v. Sharp, 201 Ill. 86, and Elmore v. Johnson, 143 Ill. 513. These cases and certain other like cases are reviewed in Comerford v. Loewenbein, 227 Ill. App. 321, 328. The Elmore and Robinson cases were proceedings in equity, brought by clients against their attorneys to avoid the legal effect of a contract between the parties, upon the ground of fraud or misrepresentation. (See also Warner v. Flack, 278 Ill. 303; Dyrenforth v. Palmer Tire Co., 240 Ill. 25.)

In Ward v. Yancey, 78 Ill. App. 368, an attorney sued in assumpsit upon a due bill given him by Yancey, the client, and the trial court entered judgment for plaintiff for the amount of the note. In its opinion the Appellate court of the Third District stated (pp. 370-1):

"The chief contention of appellant is that, inasmuch as the instrument sued on was executed in consideration of legal services, the relations of the maker and payee were such as to require affirmative proof on the part of appellee that the contract was fair and free from fraud. As such proof was not made, he contends that appellee did not make out a case. The contention is based on the rule of law that makes dealings between client and attorney prima facie fraudulent as against the attorney, and requires the attorney in controversy with his client to show that the transaction is fair and equitable. When we come to consider the reason of the rule and the character of cases in which it has been announced, we do not think it applicable to the case at bar. So far as we are advised, the rule has only been applied to

The parties agree that the action of the court in sustaining defendant's motion for a finding as to counts 1, 2, 3 and 4 was based upon the theory that an affidavit of defense showed that the matters involved in said counts arose out of the relationship of attorney and client, the burden of proof, under the law, was upon plaintiff to prove, affirmatively, good faith, absence of undue influence, agency, and equity as to said matters, and that an affidavit offered no proof in that regard he failed to make out a prima facie case, under the law. Defendant contends that the trial court was justified in sustaining his motion.

In support of the action of the trial court, defendant cites Robinson v. Bunn, 202 Ill. 83, and Amore v. Johnson, 143 Ill. 313. These cases and certain other like cases are reviewed in Commentary v. Loewenstein, 227 Ill. App. 323. The Amore and Robinson cases were proceedings in equity, brought by clients against their attorneys to avoid the legal effect of a contract between the parties, upon the ground of fraud or misrepresentation. (See also Wagner v. Wick, 228 Ill. 303; Wendell v. Wagner Tire Co., 240 Ill. 25.) In Ward v. Kenney, 78 Ill. App. 368, an attorney used in accordance with a due bill given him by Kenney, the client, and the trial court entered judgment for plaintiff for the amount of the note. In its opinion the appellate court of the third district stated (17, 240-1):

"The chief contention of plaintiff is that, inasmuch as the instrument used on which rested its consideration of legal services, the relation of the parties and payment were such as to require affirmative proof on the part of appellee that the contract was fair and free from fraud. A such proof was not made, he contends that appellee did not make out a case. The contention is based on the rule of law that a contract between attorney and attorney prima facie fraudulent as against the attorney, and requires the attorney in controversy with the client to show that the transaction is fair and equitable. When we come to consider the reason of the rule and the character of cases in which it has been announced, we do not think it applicable to the case at bar. So far as we are advised, the rule has only been applied to

cases of bargain and sale of property, and usually in courts of equity. In his excellent work on Attorneys and Counselors at Law, Mr. Weeks has, in section 268, stated the rule as follows: 'The attorney who bargains in a matter of advantage to himself with his client, is bound to show that the transaction is fair and equitable; that he fully and faithfully discharged his duties to his client, without misrepresentation or concealment of any fact material to the client; that the client was fully informed of his rights and interests in the subject-matter of the transaction, and the nature and effect of the contract, sale or gift, and was so placed as to be able to deal with his attorney at arm's length.' The rule is stated by this author, as it is by Mr. Mechem, Judge Story, and other text book writers, in connection with dealings between client and attorney over property rights. The relation of attorney and client has always been regarded as one of special trust and confidence. The law, therefore, very properly requires that all dealings between them shall be characterized by the utmost good faith. By reason of his superior knowledge of the law, the attorney has his client at a disadvantage. He is better informed as to the rights and interests of his client in the subject-matter of the transaction and the nature and effect of a sale or gift of it, and that is the reason of the rule of law which requires him, in a legal controversy with his client, to show affirmatively that fairness and equity characterized his conduct. In each of the four Illinois cases cited by appellant, in which the rule is announced - Jennings et al. v. McConnell et al., 17 Ill. 148; Morrison et al. v. Smith, 130 Ill. 304; Ross et al. v. Payson et al., 160 Ill. 349, and Willin v. Burdette, 172 Ill. 117 - the controversy arose in a court of equity by bill to set aside conveyances to the attorney.

"In the case at bar the dealings were not over any property rights of appellant. An application of the rule to the extent contended for by counsel would require every attorney suing upon a promissory note executed by a client for legal services to show affirmatively that the services were performed, that the charges were reasonable, and that the client so understood it when he gave the note. In a case where the transaction was simply the giving of a note in payment of legal services performed, we do not think any greater duty rests with the attorney seeking collection by suit than devolves upon any other plaintiff suing upon a promissory note."

The decision in the Ward case has been cited with approval in Harney v. Lee, 175 Ill. App. 250; Henry v. LeMoyné, 219 Ill. App. 313; and Cómerford v. Loewenbén, supra.

In the instant case plaintiff sued in assumpsit upon two promissory notes, instruments under seal that imported a consideration, and, certainly under the old practice, plaintiff by introducing the notes in evidence made out a prima facie case. In Robinson v. Yetter, 238 Ill. 320, in passing upon the effect of instruments under seal, the court stated (pp. 324-5):

"The argument is, that the defendant could not avoid the

cases of bargain and sale of property, and usually in courts of equity. In his excellent work on Attorneys and Counselors at Law, Mr. Weeks has, in section 308, stated the rule as follows: "The attorney who bargains in a matter of advantage to himself with his client, is bound to show that the transaction is fair and equitable; that he fully and faithfully discharged his duties to his client, without misrepresentation or concealment of any fact material to the client; that the client was fully informed of his rights and interests in the subject-matter of the transaction, and the nature and effect of the contract, sale or gift, and was as placed as to be able to deal with his attorney at arm's length." The rule is stated by this author, as it is by Mr. Mechem, Judge Story, and other best book writers, in connection with dealings between client and attorney over property rights. The relation of attorney and client has always been regarded as one of special trust and confidence. The law, therefore, very properly requires that all dealings between them shall be characterized by the utmost good faith. By reason of this superior knowledge of the law, the attorney has his client at a disadvantage. He is better informed as to the rights and interests of his client in the subject-matter of the transaction and the nature and effect of a sale or gift of it, and that is the reason of the rule of law which requires him, in a legal controversy with his client, to show affirmatively that fairness and equity characterized his conduct. In each of the four Illinois cases cited by appellant, in which the rule is announced - Jennings et al. v. McCormick et al., 117 Ill. 148; Morrison et al. v. Smith, 130 Ill. 304; Ross et al. v. Payson et al., 160 Ill. 349; and William v. Bradette, 172 Ill. 117 - the controversy arose in a court of equity by will to set aside conveyances to the attorney.

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The decision in the Ward case has been cited with approval in Ward v. Lee, 175 Ill. App. 320; Henry v. McKee, 118 Ill. App. 313; and Combsford v. Loewenbach, supra.

In the instant case plaintiff used an assignment upon two promissory notes, instruments under seal that imported a consideration, and, certainly under the old practice, plaintiff by introduction of the notes in evidence made out a prima facie case. In Robinson v. Yetter, 232 Ill. 320, in passing upon the effect of instruments under seal, the court stated (pp. 324-5): "The argument is, that the defendant could not avoid the

effect of his contract by showing fraudulent representations as to the nature and value of the land, but must resort to a court of equity to set aside the contract on that ground. The rule contended for applies where a contract is under seal, and in that case relief on the ground of fraud relating merely to the consideration must be obtained in a court of equity. A seal imports a consideration, and a court of law refuses to investigate the question whether there were fraudulent representations touching merely the nature or value of the consideration, but leaves the party to a court of equity, where the consideration may be impeached for fraud and the instrument can be set aside upon such terms as are equitable and just between the parties. (Papke v. Hammond Co., 192 Ill. 631; Escherick v. Traver, 65 id. 379.)"

Under the old practice, if a defendant desired to question the consideration supporting the note sued upon he was obliged to file a bill in chancery, and the court, in such proceeding, if the evidence warranted it, could give relief, upon terms equitable and just between the parties. But defendant contends that the new Practice Act has changed the former procedure, and cites, in support of his contention, par. 155, sec. 31, Ill. Rev. Stat. 1937, which provides:

"(Forms of action.) (1) Neither the names heretofore used to distinguish the different ordinary actions at law, nor any formal requisites heretofore appertaining to the manner of pleading in such actions respectively, shall hereafter be deemed necessary or appropriate, and there shall be no distinctions respecting the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules adopted pursuant thereto; but this section shall not be deemed to affect in any way the substantial averments of fact necessary to state any cause of action either at law or in equity."

Defendant concedes that the pleadings were settled before the new Practice Act became effective, but he contends that the trial court and the parties tried the cause upon the assumption that the new act applied. Plaintiff contends that the record refutes defendant's contention. We find nothing in the report of proceedings to show whether the trial court considered the proceeding as one in law or one in equity. Even the discussion between the court and counsel, when the court was considering defendant's motion at the conclusion of the evidence, has been omitted from the report of proceedings, so that it is not possible to determine the position taken by each counsel in respect to the character of the proceedings. Section 31

effect of his contract by showing fraudulent representations as to the nature and value of the land, but was resort to a court of equity to set aside the contract on that ground. The rule of equity for applies where a contract is voidable, and in that case relief on the ground of fraud resting merely to the consideration must be obtained in a court of equity. A well founded consideration, and a court of law refused to investigate the question whether there were fraudulent representations tending merely the nature or value of the consideration, but leaves the party to a court of equity. Where the consideration may be impeached for fraud and the instrument can be set aside upon such terms as are equitable and just between the parties. (*Hammond Co., 192 Ill. 681; Becker v. Traver, 65 Ill. 577.*)

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"(Terms of action.) (1) Whether the names heretofore used to distinguish the different ordinary actions at law, nor any formal remedies heretofore appertaining to the manner of pleading in such actions respectively, shall heretofore be deemed necessary or appropriate, and there shall be no distinction regarding the manner of pleading between such actions at law and suits in equity, other than those specified in this Act and the rules adopted pursuant thereto; but this section shall not be deemed to affect in any way the substantial elements of fact necessary to state any cause of action either at law or in equity."

Defendant concedes that the pleadings were settled before the new Practice Act became effective, but he contends that the trial court and the parties tried the case upon the assumption that the new act applied. Plaintiff contends that the record reflects defendant's contention. We find nothing in the report of proceedings to show whether the trial court considered the proceedings as one in law or one in equity. Even the discussion between the court and counsel, when the court was considering defendant's motion at the conclusion of the evidence, has been omitted from the report of proceedings, so that it is not possible to determine the position taken by each counsel in respect to the character of the proceedings. Section 31

provides that the rules of court adopted pursuant to the act shall apply to actions, and Rule 1 of the Circuit court of Cook county provides for law and chancery divisions. Section 4 of Rule 6 of the court provides:

"When in the course of any suit an order has been entered transferring the suit or any cause of action, counterclaim or issue embraced therein from common law to chancery or vice versa, the assignment to a particular Judge of such transferred suit, cause of action, counterclaim or issue shall be as the Executive Committee by order may direct."

Rule 27 provides:

"Sec. 1. All matters which, prior to January 1, 1934, were within the jurisdiction of a court of equity, whether directly or as incident to other matters before it, and all legal issues which, prior to January 1, 1934, could have been determined by such court for the purpose of doing complete justice between the parties, shall be heard and decided in the manner theretofore practiced in courts of equity.

"Sec. 2. Where in a single suit, there arises legal and equitable issues requiring different modes of trial, the equitable issues whenever practicable shall be tried and determined in advance of the legal."

After a careful consideration of the entire record, we have reached the conclusion that justice will be best served by a retrial of the cause so far as counts 1, 2, 3 and 4 are concerned. When the case is redocketed, if defendant so desires, it may be transferred from the common law to the chancery side of the court, where, upon amended pleadings, the consideration for the instruments may be impeached for fraud or duress, and if the evidence warrants it the instruments may be set aside, but upon such terms as are equitable and just between the parties.

Defendant has not filed cross-error as to the finding of the trial court that plaintiff was entitled to \$1,500 for services, under counts 5 and 6, and while plaintiff states that the ex parte judgment should have been confirmed in toto, he has not argued that the \$1,500 allowed under the said counts was not sufficient under the proof.

That part of the judgment of the Circuit court of Cook county finding the issues for defendant under the first, second,

provided that the rules of court adopted pursuant to this act shall apply to actions, and Rule 1 of the District Court of Cook County provides for law and equity divisions. Section 4 of Rule 3 of the court provides:

"Then in the course of any suit an order has been entered transferring the suit on any cause of action, counterclaim or issue embraced therein from common law to equity or vice versa, the assignment to a particular judge of such transferred suit, cause of action, counterclaim or issue shall be as the Executive Committee by order may direct."

Rule 27 provides:

"Sec. 1. All matters which, prior to January 1, 1934, were within the jurisdiction of a court of equity, whether directly or as incident to other matters before it, and all legal issues which, prior to January 1, 1934, could have been determined by such court for the purpose of doing complete justice between the parties, shall be heard and decided in the same manner as if they were suits of equity."

"Sec. 2. Where in a single suit, there arises legal and equitable issues requiring different modes of trial, the equitable issues whenever practicable shall be tried and determined in advance of the legal."

After a careful consideration of the entire record, we have reached the conclusion that justice will be best served by a reversal of the case so far as counts 1, 2, 3 and 4 are concerned. When the case is retried, it will be retried on its merits, it may be transferred from the common law to the equity side of the court, where, upon amended pleadings, the consideration for the instruments may be impeached for fraud or duress, and if the evidence warrants it the instruments may be set aside, but upon such terms as the equitable and just between the parties.

Defendant has not filed a motion for a new trial as to the finding of the trial court that Plaintiff was entitled to \$1,500 for services, under counts 5 and 6, and while Plaintiff states that the expert judgment should have been confirmed in 1930, he has not argued that the \$1,500 allowed under the said counts was not sufficient under the proof.

That part of the judgment of the District Court of Cook County finding the law for defendant under the first, second,

third and fourth counts of the amended declaration is reversed,
and the cause is remanded for a new trial in respect to said
counts.

JUDGMENT REVERSED IN PART,
AND CAUSE REMANDED FOR A NEW
TRIAL WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

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38971

FRANCES PRIHODSKI, Administratrix
of the Estate of FELIX GURRISTER,
Deceased,

Appellee,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

291 I.A. 617²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action at law to recover damages, under the Federal Employers' Liability Act, for the death of Felix Gurrister, plaintiff's intestate. Defendant appeals from a judgment entered upon a verdict finding defendant guilty and assessing plaintiff's damages at \$12,000.

No question is raised as to the pleadings. The accident in question occurred December 13, 1933, about ten o'clock a.m., on a clear day, at defendant's Corwith switch yards, located between 38th and 47th streets, in Chicago. Plaintiff's intestate, Felix Gurrister, an employee of defendant, was run over by a moving freight car and instantly killed. The yards contain many tracks, which extend in a general north and south direction. When freight trains of defendant arrive in Chicago they are taken to this yard, where each car is classified and placed in another train for further transportation. The tracks in the yards are so arranged that a switch engine can shove a car down one of the lead tracks and by means of switch tracks the car can be placed on the track whereon the train of which it is to form a part is being made up. It was the custom, when switching or classifying cars in the yards, "for the switch engine to pull

FRANCIS THOMSON, Administrator
of the Estate of PAUL G. THOMSON,
Deceased,
Appellee,
v.
THE THOMSON, BROWN AND BROWN CO.
RAILWAY COMPANY, a corporation,
Appellant.

CHICAGO, ILL.
JANUARY 10, 1933.

2211 A. 617

MR. JUSTICE ROBERTS delivered the opinion of the court.

An action at law to recover damages, under the Federal Employers' Liability Act, for the death of Felix Thomson, Plaintiff's intestate. Defendant appeals from a judgment entered upon a verdict finding defendant guilty and assessing Plaintiff's damages at \$12,000.

No question is raised as to the facts. The accident in question occurred November 12, 1932, about ten o'clock a.m., on a clear day, at defendant's Gowanus switch yards, located between 38th and 47th streets, in Chicago. Plaintiff's intestate, Felix Thomson, an employee of defendant, was run over by a moving freight car and instantly killed. The yards contain many tracks, which extend in a general north and south direction. The freight train of defendant arrive in Chicago they are taken to this yard, where each car is classified and placed in another train for further transportation. The tracks in the yards are so arranged that a switch engine can shove a car down one of the lead tracks and by means of switch tracks the car can be placed on the track between the train of which it is to form a part as being made up. It was the custom, when switch- ing or classifying cars in the yards, for the switch engine to pull

a string of cars onto one of the lead tracks and then kick them down the lead track so that they would roll onto the various tracks where it was desired to place them." The kicking operation is accomplished by starting the engine in the direction a car is to be kicked, and at a given signal from the switch foreman one of the brakemen pulls the coupling pin between the car that is to be kicked and the rest of the train; the engine ~~and the remaining part of the train~~ is then slowed down and the uncoupled car rolls down the track by its own momentum. Sometimes a number of switch engines would be engaged in this operation at the same time. Trains and engines were continually moving around in the yards and cars were being switched back and forth. The deceased was one of a number of air brake inspectors who worked in the yards. The deceased had been employed there for twenty-two years, and was familiar with the manner in which "cars were shunted around in the yards." He was fifty-three years of age, and a "careful, sober man." In the performance of their duties air brake inspectors were obliged to constantly cross the tracks.

A number of ^{the} employees testified that because of the nature of the work in the yard it was the custom for the employees "to look out for themselves" when they were walking across the tracks. Witness James Dart, foreman of a switching crew, testified that under the rules of the company applicable to switching operations, if the employees in charge of such work saw anybody on the track, it was their duty to shout, "Look out," but that they were not obliged to pay any attention to persons not on the track. L. C. Brown, the trainmaster at the Chicago terminals, which include the Corwith yards, testified, in response to the question "whether or not there was any custom or practice with respect to giving notice or warning to air brake men, oilers, car inspectors, and men working around the

the

cars and tracks in the Corwith Yards when cars are kicked or switched around in those Yards:" "I would say that the custom is about similar to that used by any citizen in warning pedestrians crossing the street. If you see a man walking in the street that you think might get hit by an automobile or cab you might holler at him to 'Look out.' That is the same method used by the men with regard to their fellow workmen." It is a fair deduction from the evidence that there was a custom or rule for members of a switching crew to shout a warning to an employee who was in a position of danger or who was about to place himself in such a position.

About 9:30 a.m., on the day of the accident, the deceased and his fellow workers commenced inspecting a short string of cars on track No. 10, which is about 120 to 150 feet east of a track called the "old lead" track. This string of cars extended to the south of the point where deceased was killed. After finishing their work, all of the men, save the deceased, walked together in a northwest direction across the intervening tracks toward the car inspectors' shanty to get instructions from the yardmaster. The shanty was from 300 to 500 feet northwest of the train they had been inspecting. The deceased followed his fellow employees at a distance of about three or four car lengths. As the latter walked towards the shanty they saw a freight train slowly moving north on the "ice house lead" track, which is west of the old lead track. They, however, crossed that track about twenty-five feet in front of this train, which almost immediately cut off their view of the deceased. They then proceeded towards the shanty. So far as the record shows there were no witnesses to the accident. A few minutes before the accident an engine with a switching crew had gone in on the old lead track to a point south of the place where the accident occurred, and picked up four cars, one of which, number PFE 931, was the second car from the south. The

and traced in the morning. I saw the victim on
 twisted around in such a way that his position is
 about similar to that of a person in a sitting position
 crossing the street. If you see a man walking in the street and
 you think might be a man walking on a sidewalk or on a street
 at him to look out. This is the same as that used by the man
 with regard to their fellow victim. It is a fairly common thing
 the witnesses that there was a witness on each side of the street
 the crew to about a corner to an employee who was in a position of
 danger or was about to place himself in such a position.
 About 9:30 a.m., on the day of the accident, the deceased and
 his fellow workers commenced inspecting a piece of work on
 track No. 10, which is about 100 to 150 feet east of a track called
 the "old line" track. This piece of work extended to the south
 of the point where the deceased was killed. After finishing their work,
 all of the men, save the deceased, walked together in a northerly
 direction across the intersecting tracks toward the "old line" track.
 They then got instructions from the yardmaster. The deceased and two
 300 to 500 feet northwest of the train they had been inspecting. The
 deceased followed his fellow employees at a distance of about three
 or four car lengths. As the train which bore the deceased they
 saw a freight train slowly moving north on the "old line" track,
 which is east of the old line track. They, however, stopped just
 track about twenty-five feet in front of this train, which almost
 immediately cut off their view of the deceased. They then proceeded
 toward the north. As for as the record shows there were no witnesses
 to the accident. A few minutes before the accident an engine with a
 witness crew had gone in on the old line track to a point south of
 the place where the accident occurred, and picked up four cars, one of
 which, number 101, was the second car from the engine. The

engine then moved north on the old lead track to about 38th street. At that point the most southerly of the four cars was kicked onto the ice house lead. Car PFE 931, with no one "riding it," was then kicked south and onto the old lead track. While it was moving down that track at a speed of five or six miles per hour it ran over the deceased. The only witness who saw the latter just prior to the accident was Dart, foreman of the said switching crew. Called by plaintiff as a witness, he testified that at the time he cut car PFE 931 loose from the other two cars he had not seen the deceased; that car PFE 931 was "just about passing me when I saw Gurrister;" that he "was in the clear at the point where he was standing when I hollered at him;" that "he was standing still at the time;" that "at the time I yelled at Gurrister I don't think he was in a position of danger, and he was in the clear, but I hollered so that he would know there was a car coming down that way;" that he "hollered loud" at him; that he "did not see him move toward the west at any time;" that he "thought he was a section man;" that "it was on the east side of the old lead track that I saw him standing when the car was cut loose and shoved down that track;" that "at the time I hollered he was standing at the side of the lead, probably two or three steps away from this lead. He was standing there. I gave him notice that the car was coming down there. After hollering at Mr. Gurrister I walked north to throw the second car connected with the switch engine down on track No. 12." The witness further testified that the distance between the switch engine and the point where deceased was standing was about 200 feet, and the distance between the point where he saw deceased standing and the point where the latter was run over was probably eight feet; that as car PFE 931 proceeded south, his view of the deceased was cut off and he did not see how the accident occurred; that he ordered another car kicked and as he then looked south he observed the north trucks of car PFE 931 bouncing up and down

engines then moved north on the old lead track to about 100 feet
At that point the most sensitivity of the lead was reached into the
ice house lead. For the old lead, which was "fading", was then raised
north and onto the old lead track. While it was moving toward the track
at a speed of five or six miles per hour it was over the lead. The
only witness of the lead track was the lead track itself.
Foreman of the lead track crew. Called by witness as a witness,
he testified that at the time he was on the old lead track the other
two cars he did not see the documents; that car was not in the
leaving me when I saw the lead; that he was in the lead at the
point where he was standing when I testified as fact; that he was
standing still at the time; that at the time I testified as fact
I don't think he was in a position of a witness, and he was in the lead,
but I testified so that he was in the lead and was standing there
say; that he "refused lead" as that; that he "did not see the move
toward the west at any time; that he "refused lead" as a witness;
that "it was on the east side of the old lead track that I saw him
standing when the car was out of the lead and moved down that track; that
"at the time I testified he was standing at the end of the lead, two-
bably two or three steps from the lead. He was standing there.
I gave him notice that the car was coming down the lead. After following
at Mr. Thurston I walked north to throw the second car connected with
the witness and from on track No. 12. The witness further testi-
fied that the distance between the witness and the point where
deceased was standing was about 100 feet, and the distance between the
point where he was deceased standing and the point where the lead was
run over was probably about 100 feet; that the car was 200 feet south,
His view of the deceased was not all that he did not see how the acci-
dent occurred; that he observed another car which was in the lead
south he observed the north track of the old lead track up the

and realized that the man he had observed had been run over. None of the other witnesses knew anything about the accident. John Borg, working as a switchman under Dart, testified he heard Dart holler "Yoo-hoo" and shortly after that the latter gave a signal to stop the switching, and witness ran down the lead and saw someone lying on the track.

Defendant contends that (1) plaintiff cannot recover because deceased assumed the risk of being struck by cars which were being switched, and (2) defendant was not guilty of any negligence which proximately caused the death of deceased. Plaintiff contends that "the principal questions involved are (a) was the deceased in a position of danger at the time of the switching operations; (b) did the defendant, through its servants, have knowledge thereof, and (c) was a proper warning given?"

Section 51 of the Federal Employers' Liability Act provides:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents * * *."

"Any action which seeks to impose liability upon a common carrier under the provisions of the Federal Employers' Liability act must be founded upon negligence. (Barnes' Fed. Code, sec. 8069.) The company is not a guarantor of the safety of the place of work or of the machinery and appliances used. The extent of its duty is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. (Roberts' Injuries to Interstate Employees, sec. 12; Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492.) * * * In applying the Federal Employers' Liability act this court is bound by the decisions of the Supreme Court of the United States. (Brant v. Chicago and Alton Railroad Co., 294 Ill. 506; Central Vermont Railway Co. v. White, 238 U. S. 507.) In occupations involving no extraordinary hazard, in which an employee engages voluntarily, without compulsion or emergency, he is conclusively presumed to have assumed such risks as are ordinarily incidental thereto, not due to the employer's negligence or violation of law. Chicago, Rock Island and Pacific Ry. Co. v. Ward, 252 U. S. 13; Chicago and Northwestern Railway Co. v. Bauer, 241 id. 470. * * * The Supreme Court of the United States, in Patton v. Texas and Pacific Railway Co., 179 U. S. 558, pointed out that 'while the employer is bound to provide a safe place and safe machinery in which and with

and realized that the fact of observation had been made by him.

of the other witnesses and anything about the accident.

He, working as a switchman with him, testified he heard that

holler "too-hoo" and shortly after that the latter gave a signal

to stop the switchman, and shortly ran down the track and

was lying on the track.

Regarding complaint that (1) claimant could not recover because

accident occurred the day of a strike which was being

observed, and (2) claimant was not fully of his negligence when

proximately caused the death of deceased. Claimant contends that

"the principal negligent investigation (a) was the accident in a

position of danger at the time of the following operations; (b) did

the defendant, through its servants, have knowledge thereof; and (c)

was a proper coming event."

Section 31 of the Federal Employers' Liability Act provides:

"Any common carrier by railroad who employs any person in connection

between any of the several States or Territories * * * shall be liable

for any damages to any person suffering injury while he is employed

by such carrier in such service, or, in case of the death of such

employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of

any of the officers, agents, or employees of such carrier."

"Any section which we are to impose liability upon a common

carrier under the provisions of the Federal Employers' Liability

Act must be founded upon negligence. (Barnes, 240, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

which the employee is to work, and while this is a positive duty resting upon him and one which he may not avoid by turning it over to some employee, it is also true that there is no guaranty by the employer that the place and machinery will be absolutely safe.' The mere happening of the accident raises no presumption that it was caused by negligence. (Spring Valley Coal Co. v. Buzis, 213 Ill. 341; Diamond Glue Co. v. Wietzychowski, 227 id. 338; Patton v. Texas and Pacific Railway Co., supra.)" (Huff v. I. C. R. R. Co., 362 Ill. 95, 99-101.)

Under the act contributory negligence is not a defense, but only goes to the question of mitigation of damages.

Relying upon the doctrine of assumption of risk, defendant contends that under the established, well understood custom and rule that prevailed in the yards "the deceased and his fellow workmen were required to protect themselves." It would seem hardly necessary for us to say that we find no merit in this contention. The evidence does not support the statement as to the alleged rule and custom, and if it did, the law would not permit such a custom or rule to be invoked against defendant's employees. We agree with plaintiff that defendant could not establish, by rule or custom, a lesser standard of care than the law required and thereby bind its employees to such standard. An employer, in the conduct of his business, is bound to exercise that care towards his employees that the law requires; but if an employer, in the conduct of his business, establishes a custom whereby he would be exercising more care towards his employees than the law requires, an employee would have the right to rely upon such custom, and the failure to observe it, if it resulted in injury to the employee, would be negligence. An employee has the right to rely on signals and warnings customarily given in the conduct of the business in which he is engaged, and if the employer fails to give these, he is negligent. (See St. Louis & S. F. Ry. Co. v. Jeffries, 276 F. 73, 75, and the many cases cited in support of the text.)

The fatal weakness in plaintiff's case, however, is that there

is no evidence to sustain the claim that defendant was negligent at the time and place in question. To support the contention that the judgment should be sustained, counsel for plaintiff is forced to assume that deceased was in a position of danger at the time of the switching operation. There is no basis, in the evidence, for the assumption. Counsel argues that it is a reasonable inference, from the evidence, that Dart saw deceased in a position of danger "before car PFE 931 was cut from the engine and shunted down the old lead." Dart testified that he cut car PFE 931 loose from the other two cars before he saw deceased; that that car was "just about passing me when I saw Gurrister." He testified, positively, that the deceased was standing still, about eight feet away from the track ^{upon} which car PFE 931 was shunted, during the entire time that he saw the deceased. The accident occurred at ten o'clock a.m. It was a clear day and there was nothing to interfere with deceased's view of the switching operation and the approaching car. It is somewhat significant that when the other air brake inspectors crossed the ice house lead track an approaching train was only twenty-five feet away from the point where they crossed. The only reasonable inference that can be drawn from the evidence is that deceased thought that he could pass over the old lead track without being struck by the car that was being shunted onto that track. Unfortunately, he misjudged the situation.

We are forced to the conclusion that the trial court erred in failing to sustain defendant's motion for a directed verdict at the close of all the evidence, and the judgment of the Circuit court of Cook county is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Sullivan, J., concur.

38996

GEORGE A. MCKINLOCK,
Appellee,

v.

205 WEST JACKSON BUILDING
CORPORATION, a corporation,
Appellant.

59 A
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

291 I.A. 61³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover rents alleged to be due him under a lease and supplemental lease. The court found the issues against defendant and assessed plaintiff's damages at \$161,041.67. Defendant appeals from a judgment entered upon the finding.

On December 1, 1928, the parties entered into a lease of the premises commonly known as 205 West Jackson Boulevard, Chicago, for a period of ninety-nine years. The lease is a voluminous one, but only a few of its terms are material upon this appeal. The rental was fixed at the sum of \$125,000 per year. On January 31, 1934, the parties entered into a supplemental lease by the terms of which the ~~rent~~ rent for the period beginning January 31, 1934, and ending April 30, 1939, was reduced to \$65,000 yearly, payable quarterly, upon certain express conditions. Paragraph 9 of the supplemental lease contains the following:

"As an express condition to the reduction of rental in paragraphs 1 and 2 hereof provided, it is covenanted and agreed that if at any time or from time to time during the period ending with and including May 31, 1944

"(a) * * *

"(b) Lessee fails to pay the taxes for 1930 and/or 1931 taxes and/or subsequent taxes, as in paragraphs 3, 4, 5 and 7 hereof provided, time being of the essence; or

"(c) Default is made in the due and full observance or

GEORGE A. HARRISON,
Plaintiff,

v.

BOB WEST LAKESIDE BUILDING
COMPANY, INC., a corporation,
Defendant.

IN SENATE
JANUARY 11, 1934.

SENATE

THE JUDICIAL DEPARTMENT FOR THE DISTRICT OF COLUMBIA.

Plaintiff sued to recover rents alleged to be due him under a lease and supplemental lease. The court found the lease and supplemental lease and awarded plaintiff's damages of \$11,000. Defendant appeals from a judgment entered upon the findings.

On December 1, 1928, the parties entered into a lease of the premises commonly known as 303 West Jackson Boulevard, Chicago, for a period of ninety-nine years. The lease is a voluntary one, but only a few of its terms are material upon this appeal. The rental was fixed at the sum of \$125,000 per year. On January 31, 1933, the parties entered into a supplemental lease for the term of which the record does not show. The supplemental lease, beginning January 31, 1933, and ending April 30, 1934, was reduced to \$125,000 yearly, payable quarterly, upon certain express conditions. Paragraphs 9 and 10 of the supplemental lease contain the following:

"As an express condition to the execution of this lease in paragraphs 1 and 2 hereof provided, it is covenanted and agreed that it is at any time or from time to time during the term of this lease and including May 31, 1934

"(a) * * *

"(b) Lessee fails to pay the taxes for land and/or taxes and/or improvement taxes, as in paragraphs 1, 2 and 3 hereof provided, the term of the lease; or

"(c) Default is made in the full payment of or

performance of any covenant, provision or condition by said Indenture of Lease or hereby required to be kept, performed or observed by Lessee and such default shall not be wholly cured within thirty days after written notice in respect thereof to Lessee; or

"(d) * * *

then the reduction of rental expressed by paragraph 1 and paragraph 2 hereof shall, ipso facto, be annulled and become ineffective as at June 1, 1932, and thereupon the rent reserved by said Indenture of Lease, namely, at the rate of One Hundred Twenty-five Thousand Dollars per annum, shall, as of June 1, 1932 be reinstated and any arrears therein (giving Lessee credit for payments of rent actually made on and after June 1, 1932) shall immediately become due and payable without notice of any kind or to anyone."

If plaintiff's theory, that defendant was in default under the terms of the supplemental lease and because of such default paragraph 9 of the supplemental lease applied, is sound, then, after giving defendant credit for all amounts it paid for rent at the rate of \$65,000 annually, there remained due plaintiff \$161,041.67. The original lease remained in full force and effect save as modified by the supplemental lease. Under the original lease (Art. III, Sec. 1) the lessee was to pay, in addition to the rent, "all taxes, * * * general and special, * * * of every name, nature and kind whatsoever, * * * which may at any time after the year 1927 have been, or which may at any time after said year 1927 and until the expiration of said term be, taxed * * * upon the said Demised Premises, or any part thereof, or upon any and all buildings and improvements that may at any time during the continuance of said term be, stand or be placed upon Demised Premises * * *." Under section 2 of the original lease defendant expressly agrees that it will not become delinquent nor suffer the demised premises or the improvements thereon to become delinquent in respect of payment of general taxes but will pay and discharge the same before such delinquency and before any penalties or costs may accrue thereon by reason of the nonpayment thereof. Paragraph 7 of the supplemental lease provides:

performance of any contract, provision or condition by which
Indemnity of Loss or injury resulting to be made, payment or
observed by Lessee and such damage shall not be deemed to be
within thirty days after written notice in respect thereof to
Lessee; or

"(d) * * *

then the retention of Lessee expressed by paragraph 1 and paragraph
2 hereof shall, from 1932, be annulled and become ineffective as
at June 1, 1932, and thereupon the rent received by said Indemnity
of Lessee, namely, at the rate of One Hundred Twenty-five Dollars
Dollars per annum, shall, as of June 1, 1932, be reinstated and any
arrear therein (having been credit for payments of rent actually
made on and after June 1, 1932) shall immediately become due and
payable without notice of any kind or to whom."

If plainiff's theory, that defendant was in default under the terms
of the supplemental lease and because of such default paragraph 2
of the supplemental lease applied, is sound, then, after paying
defendant credit for all amounts it paid for rent at the rate of
\$68,000 annually, there remained due plainiff \$11,041.67. The
original lease remained in full force and effect and was modified
by the supplemental lease. Under the original lease (Art. III,
Sec. 1) the lessee was to pay, in addition to the rent, "all taxes,
* * * general and special, * * * of every kind, nature and kind

hereafter, * * * which may at any time after the year 1932 have been,
or which may at any time after said year 1932 and until the expiration
of said term be, levied * * * upon the said leased premises, or any
part thereof, or upon any and all buildings and improvements there-
on at any time during the continuance of said term or, stand or be
placed upon leased premises * * *. Under section 2 of the original
lease defendant expressly agrees that it will not become delinquent
nor suffer the leased premises or the improvements thereon to become
delinquent in respect of payment of general taxes but will pay and
discharge the same before such delinquency and before any penalties
or costs may accrue thereon by reason of the non-payment thereof. Para-
graph 7 of the supplemental lease provides:

"As to all taxes, assessments, rates, charges and levies for the year 1932 and thereafter, Lessee confirms the provisions of said Indenture of Lease, and particularly of Article III thereof, and in furtherance thereof agrees that all taxes, assessments, rates, charges and levies and any installments thereof which fall due during the period January 1, 1934 to and including May 31, 1939, shall be paid within ten months after the due date thereof, or in any event (even though prior to the expiration of such ten-months' period), within five days after the entry of order or judgment of sale of demised premises for failure to pay the same, provided that all such taxes, assessments, rates, charges and levies and all installments thereof falling due during such period shall be paid on or before May 31, 1939, time being of the essence of these provisions and of each thereof. Nothing herein contained shall be construed as prohibiting Lessee from contesting any taxes, assessments, rates, charges and levies as in Section 3 of Article VI of said Indenture of Lease provided, but Lessee shall not, in respect of contest of any taxes, assessments, rates, charges and levies or installments thereof which fall due during the period January 1, 1934, to and including May 31, 1939, be required to furnish Lessor with security as in said Section 3 of Article VI of said Indenture of Lease provided, unless the effect of such contest is to postpone payment of any part of such taxes, assessments, rates, charges and levies or installments thereof beyond the ten months after the due date thereof or beyond May 31, 1939, in which event Lessee agrees that at or before the end of such ten months, or on or before May 31, 1939, as the case may be, it will furnish to Lessor security as in said Section 3 provided in respect of such unpaid part, including penalties and interest."

Under the original lease (Art. VI, Sec. 3) defendant might contest the taxes "upon written notice to Lessor ***, accompanying such notice with security good and sufficient in character and amount."

In its brief defendant assumes that plaintiff will contend that the mere failure of defendant to pay the taxes constituted a default in the terms of the lease and supplemental lease and that thereby the rental fixed by the original lease was reinstated, even though defendant was contesting the taxes; but plaintiff states that he makes no such contention, and adds: "The default upon which plaintiff relied was not failure to pay the 1932 taxes; by contesting those taxes defendant had, for purposes of the lease as supplemented, relieved itself of the necessity of paying the same within ten months after their due date, but when the effect of the contest was to postpone payment beyond such ten months, plaintiff was under necessity of furnishing security and it is upon such default in

furnishing such security as required by Section 7 of the supplemental lease that plaintiff's case rests. * * * To avoid hardship on the lessee, both the original lease (Article VI, Section 3) and the supplemental lease in Section 7 thereof permitted lessee to file objections and contest the validity of general taxes." Plaintiff further states: "No reliance is placed upon defendant's failure to give notice of contest, nor upon defendant's failure to furnish security at the time the objections were filed in September, 1934, but upon defendant's failure to furnish security on or before expiration of ten months after the due date of the 1932 taxes where the contest thereof had the effect of postponing payment of the 1932 taxes or some part thereof beyond that ten months' period. Therefore, plaintiff's knowledge of the filing of the objections in September, 1934, his failure at that date to insist upon notice of the contest and upon the furnishing of securities at that date and whether such failure constitutes a waiver are all immaterial."

The rentals were paid regularly on the basis of the rental fixed by the supplemental lease. Defendant filed objections in the County court to the real estate taxes levied against the premises for the year 1932 and they were still pending at the time of the trial of the cause, March 11, 1936. Plaintiff knew of the filing of the objections and the state of the proceedings in the County court. Defendant never paid the 1932 taxes. On July 19, 1935, plaintiff served a notice on defendant et al., which contained, inter alia, the following:

"Default exists in the observance and performance by Lessee in the due and full observance and performance by Lessee of the covenants, provisions and conditions in said Indenture of Lease and Supplemental Indenture required to be kept, performed and observed by Lessee in that, among other things,

"(1) Lessee, in the opinion of competent counsel, has failed in good faith diligently and properly to prosecute its contest and objections in respect of general taxes assessed against said premises for the year 1930 and/or 1931 and/or 1932, and said general taxes, for 1930, 1931 and 1932 have not been paid in full;

...furnishing such security as required by Section 7 of the original lease that plaintiff's case was not to avoid liability on the lease, both the original lease (Exhibit 3) and the supplemental lease in Section 7 (Exhibit 4) were to file objections and demand the validity of the lease. Plaintiff further states: "The evidence is placed upon defendant's failure to give notice of contest, nor upon defendant's failure to furnish security at the time the objections were filed in September, 1932, but upon defendant's failure to furnish security on or before expiration of ten months after the date of the 1932 taxes where the contest should have the effect of postponing payment of the 1932 taxes on some part thereof paying that ten months' period. Defendant, plaintiff's knowledge of the filing of the objections in September, 1932, his failure at that date to insist upon notice of the contest and upon the furnishing of security at that date and thereafter such failure constitutes a waiver and is immaterial."

The rentals were paid regularly on the basis of the rental fixed by the supplemental lease. Defendant filed objections in the County Court to the real estate taxes levied against the premises for the year 1932 and they were still pending at the time of the trial of the case, March 11, 1933. Plaintiff knew of the filing of the objections and the state of the proceedings in the County Court. Defendant never paid the 1932 taxes. On July 15, 1932, plaintiff served a motion on defendant at St. Louis, which contained, inter alia, the following:

"Defendant admits in the observations and admissions by lease in the due and full observance and performance by lease of the covenants, provisions and conditions in said instrument of lease and supplemental instrument required to be kept, performed and observed by lease in that, among other things,

"(1) Lease, in the opinion of competent persons, has failed in good faith diligently and properly to prosecute the contest and objections in respect of general taxes assessed against said premises for the year 1932 and for 1931 and for 1930, 1929, 1928, and said general taxes, for 1930, 1931 and 1932 have not been paid in full;

"(2) Lessee has failed to pay general taxes assessed against said premises for the year 1932, or either installment thereof (all of said taxes having fallen due subsequent to January 1, 1934) within ten months after the due date thereof;

"(3) Lessee has failed in respect of its contest of general taxes for the year 1932 to furnish Lessor with security as in Section 3 of Article VI of the Indenture of Lease provided.

"Please take notice of the foregoing defaults and of the effect thereof under the provisions of said Indenture of Lease and said Supplemental Indenture, including this: That unless the 1932 general taxes are, within thirty days after the giving of this notice, paid in full or in the alternative unless, within thirty days after the giving of this notice, Lessee furnishes to Lessor security as in said Section 3 of Article VI of said Indenture of Lease required in respect of the contest of the 1932 general taxes, the reduction of rental expressed by Paragraph 1 and Paragraph 2 of said Supplemental Indenture will, ipso facto, be null and become ineffective as at June 1, 1932, and thereupon the rent reserved by said Indenture of Lease, namely, at the rate of \$125,000 per annum, will, as of June 1, 1932, be reinstated and any arrears therein (giving Lessee credit for payments of rent actually made on and after June 1, 1932) will immediately become due and payable without notice of any kind or to anyone.

"Dated, July 19, 1935.

"George A. McKinlock,
"Lessor."

During the depression the legislature passed a number of acts extending the time for the payment of taxes. The last extension act, approved April 30, 1934 (Laws of Illinois, 58th General Assembly, Third Special Session, p. 217, at p. 219), provides, inter alia, that the taxes "for the year 1932, the first installment shall not be deemed delinquent until, and shall bear interest only from and after the first day of March, 1934, and the second installment shall not be deemed delinquent until, and shall bear interest only from and after the first day of July, 1934 * * *."

The contention of plaintiff that "the 1932 general taxes became due on or before July 1, 1934, both by law and within the purview of the lease as supplemented," must be sustained. There can be no question that the taxes became due, by law, not later than July 1, 1934, and references in the lease and supplemental lease to the "due

date" of taxes must, in the absence of express contrary provisions, be taken to mean the date when the taxes became due under the law. The pertinent provisions in the lease and supplemental lease are consistent with the meaning given to "due" by our Revenue act. In Section 2 of Article III defendant expressly agreed that it would not become delinquent nor suffer the demised premises or the improvements thereon to become delinquent in respect of payment of general taxes, and would pay and discharge the taxes before such delinquency and before any penalty or costs might accrue thereon by reason of the nonpayment thereof. The legislative act just referred to fixes the time of delinquency. The argument of defendant that the due date fixed by the statute for the payment of the taxes was changed by the act of defendant in instituting the proceedings in the County court, hardly merits serious consideration. Nor does paragraph 7 of the supplemental lease change the due date. It merely grants to defendant a ten-months' period within which, under the circumstances stated in the paragraph, failure to pay would not constitute a default under Article III of the original lease. Paragraph 7 provides: "Unless the effect of such contest is to postpone payment of any part of such taxes * * * beyond the ten months after the due date thereof." The ten-months' period of grace began with the due date.

Defendant contends that even if it defaulted in any respect, such default was waived by plaintiff. We find no merit in this contention. Section 1 of Article XXIII of the original lease provides that "No delay or omission of Lessor to exercise any right or power arising from any default shall impair any such right or power or shall be construed to be a waiver of any such default or an acquiescence therein." Defendant contends that the voluntary acceptance by plaintiff, on June 1, 1935, of the quarterly rent for the months of June, July and August, 1935, at the rental rate fixed by the suppl-

mental lease, constituted a waiver of the security provided in paragraph 7. There is no merit in this contention. Plaintiff had no right to require the filing of security for the payment of the 1932 taxes until ten months after the due date. The notice in question was served upon defendant on July 19, 1935. There can be no implication from the acceptance of the quarterly rent on June 1 that plaintiff intended to waive defendant's obligation to furnish the security. Plaintiff's right to receive rent at the original rate could not accrue until thirty days after July 19, 1935, and if before the thirty days elapsed defendant furnished the security for the 1932 taxes the rent fixed by the supplemental lease would still apply. In each of the several cases cited by defendant in support of its instant contention the landlord was attempting to forfeit the lease. Here plaintiff was not attempting to forfeit the lease. While the lease and supplemental lease do not require plaintiff to serve notice on defendant, plaintiff saw fit to give the notice of July 19, 1935, and, in what seems to us a spirit of fairness, gave defendant thirty days in which to furnish the security. Defendant never tendered to plaintiff the security, nor did the latter hear from defendant in reference to the notice. We cannot agree with defendant's argument that plaintiff's actions were prompted by "a desire to overwhelm and render helpless a faithful tenant." On the contrary, we think that defendant showed scant appreciation of the conduct of plaintiff in reducing the rent from \$125,000 a year to \$65,000 a year, and in affording defendant abundant time in which to furnish the security for the taxes. It appears, from the evidence, that the state's attorney of Cook county instituted proceedings on behalf of the County collector against plaintiff to have a receiver appointed for the premises because the taxes for 1932 had not been paid, and that plaintiff then paid the said taxes, on February 29,

mental lease, constituted a waiver of the security provided in paragraph 7. There is no merit in this contention. Plaintiff had no right to require the filing of security for the payment of the 1932 taxes until ten months after the due date. The notice in question was served upon defendant on July 19, 1932. There can be no implication from the acceptance of the quarterly rent of \$25,000 that plaintiff intended to waive defendant's obligation to furnish the security. Defendant's failure to provide same on the original date could not become until thirty days after July 19, 1932, and it before the thirty days expired defendant furnished the security for the 1932 taxes the sum fixed by the governmental lease would still apply. In each of the several cases cited by defendant in support of its instant contention the plaintiff was a company that forfeit the lease. Here plaintiff was not a company but a lease. While the lease and governmental lease do not require plaintiff to give notice as defendant, plaintiff was not to give the notice of July 19, 1932, and, in fact, failed to do so in spite of fairness, gave defendant thirty days in which to furnish the security. Defendant never intended to plaintiff the security, and did the latter hear from defendant in reference to the notice. It cannot state that defendant's argument that plaintiff's failure was "excused by a desire to overreach and render plaintiff a financial loss." On the contrary, we think that defendant acted with a realization of the conduct of plaintiff in requiring the rent from \$15,000 a year to \$25,000 a year, and in refusing defendant payment for the same. It appears, from the evidence, that the state's attorney or clerk actually furnished proceedings on behalf of the county collector against plaintiff to have a receiver appointed for the premises because the taxes for 1932 had not been paid, and that plaintiff then paid the said taxes, on February 14,

1936; that finally, by agreement of the parties, possession and control of the building was given to plaintiff. While these happenings do not affect the rights of the parties in the present litigation they do tend strongly to show the reason why defendant did not pay the taxes for 1932 and did not furnish the security for the taxes.

Defendant contends that plaintiff, in this court, has abandoned the position he took in the trial court. Plaintiff introduced but one witness, and the material facts were not disputed. Defendant offered no testimony, and no propositions of law or fact were submitted to the trial court. The record shows that both sides argued the case, but the arguments have been omitted. The opinion of the court is very short and the finding of the court was based upon the failure of defendant to comply with the notice of July 19, 1935. No point as to variance was raised and we are not warranted, from the record, in sustaining this contention. The facts are not controverted, and in our view of the cause a new trial would avail defendant nothing.

Defendant contends that "the trial court erred in finding a greater sum due from the plaintiff to the defendant as rent than claimed by the plaintiff in his statement of claim and affidavit thereto attached and in rendering judgment for said larger sum." Plaintiff's witness testified that \$161,041.67 was the amount of rent due plaintiff. Counsel for defendant objected to this testimony on the ground "that evidence could not be introduced of a greater claim than the amount set forth in the affidavit of claim," viz., \$159,791.67. In plaintiff's statement of claim the ad damnum is fixed at \$200,000. There is no question but that the witness stated the correct amount, if plaintiff's theory is sustained. This was not a case where judgment was asked upon the affidavit of merits as in case of default, but one where the court heard evidence, and it has been frequently

held that under such circumstances the court may allow a greater amount than that claimed in the affidavit where the ad damnum is sufficient to cover the judgment. Defendant had no just reason to complain of the amount of the judgment, for the record shows that plaintiff waived interest upon the amount due.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

held that under the provisions of the act, a creditor
amount than that claimed in the affidavit was not
sufficient to cover the payment. Defendant had no right
to complain of the amount of the judgment, for the record shows
that plaintiff's claim was correct and the amount paid.
The judgment of the municipal court is affirmed.

THE COURT AFFIRMS.

WITNESSES, J. J. and William, J. J. and others.

39217

ANITA FISHMAN,
(Plaintiff)

Appellee,

v.

EDITH E. SLACK et al.,
Defendants.

EDNA HARRIS SMITH,
(Defendant)

Appellant.

60A
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

291 I.A. 617⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Edna Harris Smith, defendant (appellant), appeals from the final decree entered in this cause on May 13, 1936.

Plaintiff (appellee) filed her complaint to foreclose a mortgage indebtedness. It alleges that on March 1, 1927, William Slack and Edith E. Slack, his wife, executed and delivered their principal promissory note, payable to bearer, for \$10,000, with interest notes, and that to secure the payment of the notes, executed, acknowledged and delivered their trust deed on certain real estate owned by them; that the trust deed and the indebtedness secured thereby constituted a purchase money mortgage and were executed in part payment of the property; that plaintiff is the legal holder and owner of the principal note, the trust deed, and one interest extension coupon for \$300 remaining unpaid; that the principal note was extended to March 1, 1934, and the mortgage indebtedness was in default from that date; that appellant claims some right, title, interest or lien in or to the real estate as tenant,

32817

AMITA BISHWANATH
(Plaintiff)

Appellee

v.

INDITH E. LEACH et al.,
Defendants.

AMITA BISHWANATH
(Defendant)

Appellant

THIRD JUDICIAL CIRCUIT
COUNTY, COOK COUNTY.

1911 A.D.

MR. JUSTICE COCHRAN DELIVERED THE OPINION OF THE COURT.

That Harris with defendant (appellant), appeals from the

final decree entered in this cause on May 13, 1936.

Plaintiff (appellee) filed her complaint to foreclose a

mortgage indebtedness. It alleges that on March 1, 1937, William

Black and Edith E. Black, his wife, executed and delivered their

principal promissory note, payable to bearer, for \$10,000, with

interest notes, and that to secure the payment of the notes,

executed, acknowledged and delivered their trust deed on certain

real estate owned by them; that the trust deed and the indebtedness

secured thereby constituted a purchase money mortgage and were exe-

cuted in part payment of the property; that plaintiff is the legal

holder and owner of the principal note, the trust deed, and one

interest extension coupon for \$300 remaining unpaid; that the

principal note was extended to March 1, 1937, and the mortgage in-

debtedness was in default from that date; that appellant claims some

right, title, interest or lien in or to the real estate as tenant,

lessee, party in possession, contract purchaser, or otherwise, but that her rights in the real estate, if any, are junior, subordinate and inferior to the lien of plaintiff and her trust deed. The complaint prayed for the foreclosure of the trust deed but sought no deficiency decree against appellant. Appellant filed a complete answer to the complaint. She admits, therein, the execution and delivery of the principal note and trust deed as alleged in the complaint; that William Slack and Edith E. Slack were the owners of the property at the time of the execution of the trust deed, and alleges that the right of redemption in the premises belongs to her. Plaintiff (hereinafter called appellee) served notice, by mail, on the attorneys for appellant, that on February 13, 1936, at 9:30 a. m., she would move the court for the entry of an order defaulting all defendants who had not appeared or pleaded in the cause, and would also ask for an order referring the cause to a master in chancery. On that date an order was entered adjudging that certain defendants were in default and the complaint was taken as confessed against them. The order further provided that the cause be referred to Julius Miner, master in chancery, "to take proofs of the respective parties in this cause, and cause to come before him all such witnesses as the respective parties hereto may desire, and examine them severally on oath, and reduce their testimony to writing, and report the same, together with his conclusions of law and fact to this Court with the least possible delay." Appellant has not seen fit to include the master's original report in the record. On February 29, 1936, appellant moved the court to vacate the ~~some~~ order of reference and in support of the motion filed an affidavit of her attorney, which contains the following: "That the offices of Heber T. Dotson were closed on the 12th day of February,

issues, partly in connection with the... but
that her rights in the real estate, in any, are...
and inferior to the lien of Plaintiff and her...
plaintiff prayed for the foreclosure of the first...
deficiency decree against appellant. Appellant filed a...
answer to the complaint. The answer, however, the execution and
delivery of the principal note and trust deed as alleged in the
complaint; that William Jack and... Jack were the owners
of the property at the time of the execution of the first deed,
and alleged that the right of redemption in the premises belongs
to them. Plaintiff (hereinafter called appellant) served notice, by
mail, on the attorneys for appellant, dated on February 13, 1936,
at 2:30 a. m., and which reads in substance as follows: "I hereby
defeating all defendants who had not appeared or appeared in the
cause, and would also ask for an order relating to the cause to a
master in chancery. On that date an order was entered regarding
that certain documents were in default and the complaint was taken
as confessed against them. The order further provided that the
cause be referred to William Jack, master in chancery, to take
proof of the respective parties in this cause, and cause to come
before him all such witnesses as the respective parties hereto may
desire, and examine them severally on oath, and render their testi-
mony to writing, and report the same, together with his conclusions
of law and fact to this Court within the least possible delay." Appellant
has not seen fit to include the master's original report in the
record. On February 23, 1936, appellant moved the court to vacate
the order of reference and in support of the motion filed as
affidavit of her attorney, which contains the following: "That the
offices of Weber T. Notson were closed on the 12th day of February,

1936 and that the Courts were closed on the 12th day of February, 1936 by virtue of the fact that February 12th was and is a legal holiday. This affiant further states that contrary to Rule 17 of this Court that notices served by mail on attorneys should be served 36 hours before the case appears on the motion book, Sundays and holidays excludud; that this notice was served by mail on the 11th day of February, 1936; that knowledge of the said notice did not come to this affiant until the 13th day of February, 1936; that this affiant immediately got in touch with the office of Epstein and Epstein and informed them that he had just received their notice and that the said notice was not in conformity with the rules of Court and that this affiant was unable to appear at 9:30 o'clock in the forenoon, but that if Counsel would continue the motion for some other day that this affiant would appear without further notice; that someone in Mr. Epstein's office said that such a continuance was impossible since Mr. Epstein had gone to Court. This affiant further states unto this Court that certain interrogatories have been filed on behalf of Edna Harri s Smith, one of the defendants in the above entitled cause which have not been answered by the said plaintiff, Anita Fishman; that there is pending a Counter Claim seeking affirmative relief in the premises which is undisposed of; that the relief sought in the said Counter Claim is a part of this defendant's defense to the said bill of foreclosure, so much so, that right, justice and equity cannot be had in the premises unless the two causes are tried together. Affiant further says that he appeared before one Julius Miner to whom this matter was referred upon the illegal notice of the plaintiff and then and there moved the Master to refer a written motion, which is now presented to this Court, before the taking of evidence, which the said Master denied." On February 29, 1936, the trial court entered the

1936 and that the Courts were closed on the 15th day of February, 1936 by virtue of the fact that February 15th was and is a legal holiday. This affiant further states that contrary to Rule IV of this Court that notices served by mail on attorneys should be served 30 hours before the same appears on the motion book, and days and holidays excluded; that this notice was served by mail on the 15th day of February, 1936; that knowledge of this said notice did not come to this affiant until the 15th day of February, 1936; that this affiant immediately got in touch with the office of Captain and Captain and informed them that he had just received their notice and that the said notice was not in conformity with the rules of Court and that this affiant was unable to appear at 9:30 o'clock in the forenoon, but that if counsel would continue the motion for some other day this affiant would appear without further notice; that someone in Mr. Captain's office said that such a continuance was impossible since Mr. Captain had come to town. This affiant further states that this Court had certain instructions have been filed on behalf of Mrs. H. L. Smith, one of the defendants in the above entitled cause which have not been answered by the said plaintiff, this is true; that there is pending a Counter Claim against the plaintiff which is undisputed; that the matter is pending in the said County Court as part of this defendant's defense to the said bill of foreclosure, so much so, that this, Justice and equity cannot be had in the premises unless the two causes be tried together. Affiant further says that he appeared before one Justice when he was this matter was referred upon the illegal notice of the plaintiff and then and there moved the matter to refer to Justice Smith, which is now presented to this Court, before the filing of which, this said matter denied." On February 22, 1936, the trial court entered the

following order: "This cause coming on to be heard to vacate the order of reference made in the above entitled cause on the 13th day of February, A. D. 1936. The Court having jurisdiction of the subject matter and the parties thereto after having considered the motion presented to Master Julius Miner and the affidavit made in support of said motion and after listening to argument of Counsel, the motion to vacate is hereby denied." No certificate of evidence as to what occurred before the trial judge on February 29 is preserved in the record. On April 26, 1936, the record shows the entry of the following order: "Upon objections of Defendant, Edna Harris Smith, to the Master's Report, on the ground that the notice to refer said cause to said Master was deficient in law; now therefore this Court orders that this cause is now open to permit defendant Edna Harris Smith to make the defense stated in her Answer and present her evidence to said Master Miner within ten days, and this cause is now re-referred to said Master to hear the evidence and report the same together with his conclusions upon the evidence and law upon the pleadings and evidence in the whole case." Appellant has not included in the record a certificate of evidence as to what occurred at the time of the entry of this order. The record includes the master's supplemental report, but not the original report that was filed. No objections were filed to the supplemental report. From it we learn that the original report was prepared on April 14, 1936; "that subsequent thereto an order was duly entered re-opening said cause to permit the defendant, Edna Harris Smith, to make the defense stated in her answer and present her evidence to the undersigned Master in Chancery within ten days;" that the master set the hearing under the order of rereference for April 29, 1936, at which time no one appeared to present testimony on behalf of appellant although the master had duly served appellant

following order: "This case coming on to be heard to wit:
the order of reference made in the above entitled cause on the
15th day of February, A. D. 1936. The Court having jurisdiction
of the subject matter and the parties thereto after having con-
sidered the motion presented to wit: That the Master and the writ-
ten made in support of said motion and after deliberation to exam-
ment of Counsel, the motion to vacate is hereby denied. It is
certificates of evidence as to what occurred before the trial judge
on February 23 is preserved in the record. On April 23, 1936, the
record shows the entry of the following order: "Upon objection
of defendant, the Master's report, to the Master's report, on the
ground that the notice to take said case to said Master was defec-
tuent in law; now therefore this Court orders that this case be
now open to permit defendant to file a written report to make the balance
stated in her answer and present her evidence to said Master within
within ten days, and this case is now referred to said Master to
hear the evidence and report the same together with his conclusions
upon the evidence and law upon the pleadings and evidence in the
whole case." Appellant has not included in the record a certificate
of evidence as to what occurred at the time of the entry of this order.
The record includes the Master's supplemental report, but not the
original report that was filed. No objections were filed to the
supplemental report. From it is learn that the original report was
prepared on April 12, 1936; "that subsequent thereto an order was
only entered re-opening said case to permit the defendant, the
Harris Smith, to make the balance stated in her answer and present
her evidence to the undersigned Master in University within ten days;"
that the Master let the hearing under the order of reference for
April 23, 1936, at which time no one appeared to present testimony
on behalf of appellant although the Master had duly served appellant

with notice that a hearing would be had upon said date; that the master then entered a rule to close proofs and set the matter for hearing on May 5, 1936, at 2:30 p. m., but that at that time no one appeared on behalf of appellant to submit testimony, and proofs were closed. The decree is based upon the original and supplemental reports of the master and was entered May 13, 1936. On that date, apparently after the entry of the decree, there was filed with the clerk, without leave of court and without notice to appellee's attorney, an affidavit of appellant's attorney to the effect that at the time the order of April 24, 1936, was entered the cause came on to be heard on the objections and exceptions of appellant to the master's report and that after argument the court entered an order "re-opening the case to hear the evidence of Edna Harris Smith; that the affiant then and there objected to the Order entered re-opening the case and upon the objection of this affiant, attorney for Edna Harris Smith, an Order was entered on April 24, 1936, re-opening the case. That it was further provided in said order that the case be re-referred to Master Julius H. Miner, to which the affiant, as one of the attorneys of record for Edna Harris Smith, objected to the reference being made to Master Julius H. Miner, and then and there informed the Court that he did not desire that the said Julius H. Miner should hear the cause and further informed the Court that he would not present any evidence whatsoever before the said Julius H. Miner." In view of this attitude of the counsel, certain contentions raised hardly deserve serious notice.

Appellant contends that no legal service of notice was served upon her prior to the application to have the cause referred to a master and our attention is called to Rule 17, Section 2, of the Circuit court of Cook county, which provides that notices of motion shall be served upon the attorney of record of the opposite

With notice that a hearing would be had upon said date, the master then entered a writ to show cause and set the matter for hearing on May 7, 1933, at 2:00 p. m., but that at that time no one appeared on behalf of applicant to show cause, and the writ was closed. The writ is based upon the order and judgment mental reports of the master and was entered May 12, 1933. On that date, applicant filed the body of the writ, which was filed with the clerk, without leave of court and without notice to respondent's attorney, an affidavit of applicant's attorney to the effect that at the time the order of April 25, 1933, was entered the same came on to be heard on the objections and exceptions of applicant to the master's report and that after argument, the court entered an order "re-opening the case to hear the evidence of John H. Smith" that the applicant then there objected to the order entered re-opening the case and upon the objection in this affidavit, motion for John H. Smith, an order was entered on April 25, 1933, re-opening the case. That it was further provided in said order that the case be re-referred to Master Julius W. Miner, to whom the applicant, as one of the attorneys of record for John H. Smith, objected to the reference being made to Master Julius W. Miner, and then and there informed the Court that he did not desire that the said Julius W. Miner should hear the case and further informed the Court that he would not present any evidence whatever before the said Julius W. Miner." In view of the affidavits of the court, certain contentions raised hereby become material and necessary. Applicant contends that no legal review of notice was served upon her prior to the application to have the writ returned to a master and our attention is called to Rule 17, Section 2, of the Circuit Court of Cook County, which provides that notices of action shall be served upon the attorney of record of the parties

party, "if by mailing, * * * shall be deposited in the postoffice or postoffice box at least thirty-six hours before the motion is to be heard, exclusive of any intervening Sunday or legal holiday." Appellant argues that as February 12, 1936, was a legal holiday in Illinois the notice was insufficient and the order of reference was void, and, therefore, appellant was not obliged to appear in court at the time of the motion or to pay any attention to the hearing before the master. It appears from the affidavit filed by appellant in support of her motion to vacate the order of reference that appellant's attorney was in receipt of the notice prior to the hearing of the motion and that he requested counsel for appellee to continue the motion "for some other day that this affiant would appear without further notice." The argument of appellant that the master lacked jurisdiction to hear the cause is, of course, without merit. The order of reference gave the master jurisdiction to hear the cause. It was the duty of appellant's counsel to appear and defend before the master, even though he believed that the court erred in entering the order of reference. Moreover, the record shows that the trial court fully protected the rights of appellant when he rereferred the cause to the master. Appellant's solicitor, in his affidavit, states that at the time the order of rereference was entered he told the trial court that he would not appear before the master and would not present any evidence on behalf of appellant because he objected to Master Miner hearing the cause. Just what his objections were he does not state. But from aught that appears in the order of rereference, upon which we are compelled to rely in the state of the record, counsel was satisfied with the order. Although the counsel admits that he had actual notice of the motion for reference, he ignored it, and took no steps to vacate the order of reference until February 29, 1936, during which time the master had been proceeding with the

[illegible]

hearing. The procedure adopted by appellant's counsel indicates that appellant had no real defense to appellee's complaint. If counsel considered the notice that an order of reference would be asked insufficient, why did he not go before the trial court and object to a hearing upon such motion? And why did he not, after the order of rereference had been entered, appear before the master and make defense to appellee's case? According to his own affidavit, the sole reason that he did not present any evidence for appellant before the master was that "he did not desire that the said Julius H. Miner should hear the cause." If appellant had a defense to appellee's action, the counsel, a reputable member of the bar, would not have acted as he did.

Appellant contends that the court erred in refusing to consolidate the cause with another cause then pending in the Circuit court. She has not filed a certificate of evidence as to what occurred at the time of the motion to consolidate. The pleadings in the other cause are not before us. Sec. 175, ch. 110 (Ill. Rev. Stat. 1937), cited by appellant, provides that one action "may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." The trial court heard the motion to consolidate and there is nothing in the record to warrant us in holding that he abused his discretion in the matter.

Appellant contends that the court erred in striking paragraph 5 of her answer. As it appears from the affidavit of appellant's counsel that he refused to appear before the master and make any defense it is somewhat difficult to see any point to the instant contention. However, there was no error in the trial court's action in striking the paragraph, which sets up the long established equitable principle, first announced in Olds v. Cummings, 31 Ill. 188, that in a suit to foreclose by an assignee, all of the defenses that might

hearing. The procedure suggested by appellant's counsel indicates that appellant had no real defense to appellant's complaint. If counsel considered the notice that an order of reference would be asked in this case, why did he not object to the trial court and object to a hearing upon such motion? And why did he not, after the order of reference had been entered, appear before the judge and make defense to appellant's case, according to his own affidavit, the sole reason that he did not present any defense for appellant before the master was that "he did not believe that the said Lillian H. Miner should bear the cause." If appellant had a defense to appellant's action, the counsel, a reputable member of the bar, would not have acted as he did.

Appellant contends that the court erred in refusing to consolidate the case with another case then pending in the Circuit Court. The law has filed a certificate of evidence as to what occurred at the time of the motion to consolidate. The pleadings in the other case are not before us. See, 175, 176 (1911, 1912, 1913, 1914, 1915), cited by appellant, provides that one action may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right. The trial court having the motion to consolidate and there is nothing in the record to warrant us in holding that he abused his discretion in the matter.

Appellant contends that the court erred in striking paragraph 5 of her answer. As it appears from the affidavit of appellant's counsel that he stated to appear before the master and make any defense it is somewhat difficult to see any point to the instant contention. However, there was no error in the trial court's action in striking the paragraph, which sets up the long established principle, first announced in *Wain v. Wain*, 111, 158, that in a suit to foreclose by an assignee, all of the defenses that might

have been interposed against the assignor can be raised. In the last part of the paragraph appellant states, on information and belief, that appellee paid \$1,000 for the note that forms the basis of the action. As the principal note is in the sum of \$10,000, appellant by that language seems to infer, rather than allege, that the amount paid by appellee might form the basis for a defense. The consideration paid to the assignor by appellee for the mortgage is of no concern to appellant. (See Walker v. Chicago, M. & N. R. R. Co., 277 Ill. 451; McCarthy v. Stanley, 136 N. Y.^{S.} 386; Burnap v. Cook, 32 Ill. 168.) Appellee in the instant case sought no rights superior to those her assignor had, and asked for no deficiency decree against appellant.

Appellant contends that the trial court erred in striking her original counterclaim and amended counterclaim. We have considered the argument made in support of this contention and find it without merit.

Appellee contends that the order dismissing the amended counterclaim is a final order and that as appellant failed to appeal from the same the latter is in no position to now question the order (citing Grove v. Templin, 320 Ill. 597, and Holinger v. Dickinson, 183 Ill. App. 122), but we do not deem it necessary to pass upon the point.

Appellant further contends that the court erred in striking the interrogatories filed in connection with the counterclaim. If we are right in our conclusion that the trial court did not err in striking the counterclaim and the amended counterclaim it follows that there was no error in striking the interrogatories. Appellant fails to show wherein her defense would have been aided had the interrogatories been answered.

Appellant argues that the trial court was without jurisdiction

have been introduced against the defendant can be raised. In the last part of the paragraph appellant states, an information and belief, that appellee paid \$1,000 for the note that forms the basis of the action. As the principal note is in the sum of \$1,000, appellant by that language seems to infer, rather than allege, that the amount paid by appellee was in form the basis for a defense. The consideration paid to the defendant by appellee for the note is of no concern to appellant. (See Waller v. Waller, 100 U.S. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

Appellant contends that the trial court erred in striking her original counterclaim and amended counterclaim. It is urged that the argument made in support of this contention and that it without merit. Appellee contends that the order dismissing the amended counterclaim is a final order and that the appellant failed to appeal from the same the latter is in no position to now question the order (Citing Grove v. Leffler, 330 Ill. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

Appellant further contends that the court erred in striking the interrogatories filed in connection with the counterclaim. It is urged that the court did not err in striking the counterclaim and the amended counterclaim it follows that there was no error in striking the interrogatories. Appellant fails to show wherein her defense would have been aided had the interrogatories been answered.

Appellant argues that the trial court was without jurisdiction

to refer the cause to the master at the time the order of reference was made because the time granted appellant to file her amended counterclaim had not expired at the time the said order was entered. We find it somewhat difficult to understand appellant's short argument in support of this contention, but it is evident that counsel confuses the term "jurisdiction" with the term "error." The case was at issue so far as appellee's complaint was concerned, appellant had filed an answer which was complete in itself, and, under the old practice, the trial court, in his discretion, had the right to enter the order of reference without waiting for the amended counterclaim to be filed and put in issue. Appellant has not convinced us that the new Practice Act precluded the procedure followed. In any event, the amended counterclaim was stricken and appellant refused to offer any defense before the master.

From the incomplete record before us it would seem that appellant had no real defense to appellee's suit and suffered no harm by reason of the decree entered. While appellant, in her answer, alleged that appellee's assignor had been collecting rents for the premises for about two years before the filing of the complaint and that no accounting had been made to her, the decree found that the assignor and appellee had fully accounted for all rents collected from the premises and that there was a deficiency as a result of the operation of the premises by the assignor and appellee. There is no competent proof in the record to rebut that finding. There was no supersedeas bond filed by appellant and in the sale of the premises under the decree appellee purchased the property for \$4,700, leaving a deficiency due her of \$8,214.73. As appellant was not found personally liable for the payment of this deficiency she had the right to redeem from the sale for \$4,700. In conclusion, she was

given a full opportunity by the trial court to defend the cause and she refused to do so.

We find no good reason why the decree of the Circuit court should be disturbed. It is, accordingly, affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

Given a full opportunity by the trial court to defend the cause
and she refused to do so.

We find no good reason why the cause of the plaintiff
should be dismissed. It is accordingly, affirmed.

WILLIAM J. BAKER

Attorneys for Plaintiff, J. J. Baker

39326

FRANK E. SCHOLL,
Appellant,

v.

PERCY L. TALLMAN, LILLIAN H.
TALLMAN, CHARLOTTE E. TALLMAN,
EMIL P. WENGER, STEWART FOX,
TOM LEEMING, CONTINENTAL
ILLINOIS NATIONAL BANK & TRUST
COMPANY, a corporation, as Trustee
of the Estate of George B. Robbins,
Deceased, and TALLMAN, ROBBINS &
COMPANY, a corporation,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

291 I.A. 618¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A verified complaint was filed on October 6, 1936. All of the defendants save Continental Illinois National Bank and Trust Company, trustee of the estate of George B. Robbins, deceased, were served and their appearance was filed October 7, 1936. On October 8, 1936, plaintiff served notice on the defendants who had entered their appearance that on October 9, 1936, he would ask the court to appoint a receiver for Tallman, Robbins & Company, defendant, and enter an order against said corporation and its officers and directors restraining them from transferring or incumbering any of the stock of said corporation or from paying or advancing any moneys to defendant Percy L. Tallman. Thereupon the defendants who had entered their appearance served notice upon plaintiff that they would, on October 9, 1936, "move the Court to dismiss the bill of complaint filed herein for want of equity." When the two motions were reached for hearing on October 9, 1936, no answers had been filed, but the defendants who had served notice

BRANK E. SCHOLT,
Appellant,

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COMPANY, a corporation,
 Deceased, and TALLMAN, MORRIS &
 of the State of Georgia, as Trustees
 COMPANY, a corporation,
 TOM LEMMON, JOHN HARRIS & TRUST
 WITH P. MURPHY, JAMES E. BOK,
 TALLMAN, CHRISTOPHER, TALLMAN,
 F. CYRUS T. LEMMAN, WILLIAM H.

RECEIVED MAY 1 1964
U.S. DEPARTMENT OF AGRICULTURE

812 .A.1125

MR. JUSTICE STANLEY I LIVE AND THE OFFICE OF THE COURT.

A verified complaint was filed on October 9, 1936. All of the defendants have Continental Illinois National Bank and Trust Company, trustees of the estate of George A. Tobin, deceased, were served and their appearance was filed October 7, 1936. On October 8, 1936, plaintiff served notice on the defendants who had entered their appearance that on October 9, 1936, he would ask the court to appoint a receiver for Tallman, Robbins & Company, defendant, and enter an order against said corporation and its officers and directors restraining them from transferring or in any manner any of the stock of said corporation or from paying or advancing any moneys to defendant Percy L. Tallman. Thereupon the defendants who had entered their appearance served notice upon plaintiff that they would, on October 9, 1936, "move the Court to dismiss the bill of complaint filed herein for want of equity." When the two motions were reached for hearing on October 9, 1936, no answers had been filed, but the defendants who had served notice

of the counter motion "tendered to plaintiff in open court the sum of \$2,205.54 as and for the purchase price of his said fifty-five shares of capital stock of Tallman, Robbins & Company and in full satisfaction of his indebtedness to the said company in the sum of \$5,779.36, which said tender of payment was declined by the said plaintiff who was in court in person and by counsel." Thereupon the trial court entered the following order: "On Motion of Solicitor for defendant, it is ordered that the bill be dismissed for want of equity and because plaintiff does not come into Court with clean hands." Plaintiff appeals from that order.

From the allegations of the complaint it appears that defendant Tallman, Robbins & Company is an Illinois corporation, incorporated to do a general printing, publishing and bookbinding business and to manufacture, sell and deal in loose leaf devices of every kind, with a capital stock of \$100,000, divided into 1,000 shares of a par value of \$100 a share. At the time the complaint was filed Percy L. Tallman owned 330 shares; Lillian H. Tallman, 130 shares; Charlotte E. Tallman, 10 shares; Emil P. Wenger, 55 shares; Stewart Fox, 20 shares; and Frank E. Scholl, plaintiff, 55 shares. The Continental Illinois National Bank & Trust Company, as trustee of the estate of George B. Robbins, deceased, owned 400 shares, but it had not been served at the time the complaint was dismissed, and it did not appear in the proceedings in the trial court. Percy L. Tallman had been president, treasurer and a director of the corporation from 1912 until the time of the filing of the complaint; Emil P. Wenger had been vice president and a director for the same period; Tom Leeming, defendant, the attorney for the corporation, was elected a director and secretary on August 14, 1936. Plaintiff was a director and secretary of the corporation from 1920 until August 14, 1936, when he resigned

of the counter motion "tendered to plaintiff in open court the sum of \$2,805.34 and for the purchase price of his said fifty-five shares of capital stock of Tallman, Robbins & Company and in full satisfaction of his indebtedness to the said company in the sum of \$3,779.38, which said tender of payment was declined by the said plaintiff who was in court in person and by counsel." The reason the trial court entered the following order: "On Motion of Defendant for defendant, it is ordered that the bill be dismissed for want of equity and because plaintiff does not come into court with clean hands." Plaintiff appeals from that order.

From the allegations of the complaint it appears that defendant and Tallman, Robbins & Company is an Illinois corporation, incorporated to do a general banking, building and contracting business and to manufacture, sell and deal in loose leaf devices of every kind, with a capital stock of \$100,000, divided into 1,000 shares of a par value of \$100 a share. At the time the complaint was filed Percy D. Tallman owned 330 shares; William H. Tallman, 120 shares; Charlotte E. Tallman, 10 shares; Will F. Wenger, 55 shares; Robert Fox, 20 shares; and Frank E. Howell, plaintiff, 55 shares. The Continental Illinois National Bank & Trust Company, as trustee of the estate of George D. Robbins, deceased, owned 400 shares, but it had not been served at the time the complaint was dismissed, and it did not appear in the proceedings in the trial court. Percy D. Tallman had been president and treasurer and a director of the corporation from 1912 until the time of the filing of the complaint; Will F. Wenger had been vice president and a director for the same period; Tom Leaming, defendant, the attorney for the corporation, was elected a director and secretary on August 14, 1936. Plaintiff was a director and secretary of the corporation from 1930 until August 14, 1936, when he resigned.

said offices. On September 2, 1936, he was discharged as an employee of the corporation by Percy L. Tallman. The complaint alleges, inter alia, that there were no actual meetings of the stockholders or directors for three years prior to the filing of the complaint; that supposed meetings of directors were written up and signed pursuant to the order of Percy L. Tallman; that the minute book was in his possession; that he dominated and controlled the other officers of the corporation, including plaintiff, voted all of the stock of the corporation as though it were owned by a single person, and conducted the business of the corporation and dispersed its moneys, funds and assets as though the corporation were his own, and since 1930 has unlawfully and fraudulently exploited the corporation and converted its funds and assets for his own personal use. The complaint alleges that said Tallman should be required to repay to the corporation \$33,295.24 for unauthorized overdrafts and advancements; also \$5,705 for unlawful and unauthorized increase of drawing account or salary; that other officers, including plaintiff, have overdrawn their accounts; that said Tallman has made no accounting to the corporation for advancements for extra sales expenses amounting to \$32,833.08; that he has converted securities pledged by other officers as security for their overdrafts to obtain personal loans for himself; that he has caused to be carried worthless accounts, aggregating \$12,034.25, as assets of the corporation; that he is not devoting proper time to the business of the corporation and that as a result of his neglect and inattention the business has suffered and will continue to suffer; that he is insolvent; that as a result of his fraudulent mismanagement the corporation is in imminent danger of insolvency; that "the surplus of said corporation which was on to-wit: December 31, 1930, exclusive of net profits for the year 1930, in the sum of

1930, exclusive of net profits for the year 1930, in the sum of that "the surplus of said corporation which was on 1st December 1930, lent management the corporation is in imminent danger of insolvency; time to suffer; that he is involved; that as a result of his negligence and inattention the business has suffered and will continue proper time to the business of the corporation and the result of 12,034.25, as assets of the corporation; that he is not devoting that he has caused to be carried forthwith accounts, and retaining as security for their overdrafts to obtain personal loans for himself; 32,833.08; that he has converted securities pledged by other officers corporation for advancements for extra sales expensamenting to their accounts; that said Telman has made no accounting to the corporation or salary; that other officers, including plaintiff, have overdrafted also \$5,705 for material and unaccounted increase of drawing account corporation 35,235.24 for unauthorized overdrafts and advancements; plaintiff alleges that said Telman should be required to repay to the converted its funds and assets for his own personal use. The corporation has unlawfully and fraudulently depleted the corporation and funds and assets as though the corporation were his own, and since and conducted the business of the corporation and disbursed its moneys, stock of the corporation as though it were owned by a single person, officers of the corporation, including plaintiff, voted all of the book was in his possession; that he dominated and controlled the other and signed pursuant to the order of Jerry L. Telman; that the minutes the complaint; that supposed meetings of directors were written up stockholders or directors for three years prior to the filing of the complaint; inter alia, that there were no actual meetings of the employee of the corporation by Jerry L. Telman. The complaint said officers. On September 2, 1930, he was discharged as an

\$36,259.76, as shown by the books of said corporation, the sum of \$117,750.25, has been used by the said defendant, Percy L. Tallman, to pay drawing accounts, overdrafts, advancements, salaries, expenses and commissions of the officers and employees of said corporation, so that the surplus of the said corporation was, without the payment of dividends, reduced in a period of five years from the sum of \$117,750.25 by the sum of \$131,181.84 to a deficit of \$13,431.59, but said defendant, Percy L. Tallman, has nevertheless continued his unlawful and fraudulent withdrawals of the funds of said corporation for his own personal use and will continue to withdraw, in addition to the amounts to which he may be lawfully entitled for drawing account or salary and expenses, divers large sums of money, the property of said defendant corporation, to the irreparable injury and damage of said corporation, the plaintiff and the other stockholders and creditors of said corporation, unless he is enjoined by writ of injunction to be issued out of this court." The complaint prays:

"1. That the defendants, and each of them, answer this complaint.

"2. That the defendant, Percy L. Tallman, may fully set forth a just and true account of all of his actions and doings in respect to the business of the defendant, Tallman, Robbins & Company.

"3. That an accounting be made and taken under the direction of the Court of all the transactions of the defendants, Percy L. Tallman, Charlotte E. Tallman and Emil P. Wenger, and of the plaintiff of all and every of the transactions of said defendants and the plaintiff with the said Tallman, Robbins and Company and that the same may be fully adjusted and the respective rights of all the defendants and of the plaintiff be ascertained.

"4. That said defendants, Percy L. Tallman, Charlotte E. Tallman and Emil P. Wenger and the plaintiff herein pay to said Tallman, Robbins & Company such sums as may be found on such accounting to be due from them to said Tallman, Robbins & Company.

"5. That the amounts ascertained to be due as aforesaid from said defendants, Percy L. Tallman, Charlotte E. Tallman, Emil P. Wenger and the plaintiff herein be adjudged and decreed to be a lien and charge upon the shares of the capital stock of Tallman, Robbins & Company, owned or held by said defendant stockholders and by plaintiff or standing in their names respectively on the books of said corporation and particularly upon the shares of stock pledged by

said defendants, Percy L. Tallman and John L. Talbot, and Plaintiff as security for Government bonds to them as set forth in the complaint herein, and in the event of payment of such bonds to them to be due as aforesaid, that all or any of the books of record shall be applied upon the assets of said defendants to be due from said defendants and Plaintiff to said corporation.

"6. That the defendants stockholders, their respective agents and servants be enjoined and restrained from selling, conveying, transferring, pledging or otherwise encumbering any or either of the shares of the capital stock of said Tallman, Robbins & Company, owned or held by or for them or any of them, upon the face of said corporation.

"7. That said defendant, Tallman, Robbins & Company, its officers, agents and servants be restrained from selling or conveying or pledging or otherwise encumbering any or either of the shares of the capital stock of said corporation or any of them upon the books of said corporation to be examined, transferred, pledged or otherwise encumbered.

"8. That the officers and agents of the said corporation, their attorneys and servants, and particularly the said defendant, Percy L. Tallman, be enjoined and restrained, from allowing or paying to the said or to Percy L. Tallman, or from making any advances or loans to themselves or either of them or to said defendant, Percy L. Tallman, or anyone for him, of any of the moneys or funds or property of said corporation for private accounts, salaries, expenses, advances, commissions, loans, or otherwise, until the further order of this Court.

"9. That a receiver be appointed, without notice and without bond, with all the usual powers of receiver in like cases and such additional powers and duties as the Court may from time to time direct, to take possession of the books, records, moneys, property, assets, equitable interests and things in action of the said Tallman, Robbins & Company, and hold and dispose of the same pursuant to the order of this Court.

"10. That the said corporation heretofore effected may be dissolved, and all the assets, property, equitable interests and things in action and effects of the said Tallman, Robbins & Company may be collected, maintained and disposed of under the direction of this Court, the claims of creditors ascertained and paid, and after the payment of or after that the remaining assets, if any, be distributed to the stockholders of said corporation.

"11. * * *

"12. That the Plaintiff may have such other and further relief as may be just and equitable, together with the costs of this action."

In defense of the order defendants state that Plaintiff was not forced to make a heavy decision as to the remedy; that the trial judge asked Plaintiff and his attorney to sit down and think

over the tender and determine what action they desired to take in reference to the same, and defendants argue that "the declining of this tender to the plaintiff establishes that the complaint was not filed in good faith;" that he was "deliberately making use of the process of the court to settle a personal grudge or spite by harassing the defendants," and, therefore, the trial court was justified in sustaining defendants' motion to dismiss upon the ground that "plaintiff does not come into court with clean hands." Defendants concede that plaintiff was not obliged to accept the tender.

Plaintiff contends that in passing upon defendants' motion the only question before the trial court was whether the allegations in the complaint stated a prima facie case against the defendants or some of them, and that the trial court, in passing upon the motion, had no right to consider the tender.

"The practice to dismiss a bill in chancery, on motion, has not generally obtained in the courts of Great Britain, or in this country, unless it be for want of equity, apparent on the face of the bill, and where it is manifest no amendment could help it, or for want of jurisdiction." (Thomas, Trustee, etc., v. Adams et al., 30 Ill. 37, 42.)

A motion to dismiss for want of equity is treated as a general demurrer and a bill will never be dismissed upon motion for want of equity unless it is clear that no amendment will help it. This is a necessary result of treating the motion as a demurrer and upon such a motion all of the facts well pleaded in the bill are admitted. (Grimes v. Grimes, 143 Ill. 550. See also Leonard v. Arnold, 244 Ill. 429, 432-3; Hulse v. Nash, 332 Ill. 500, 508.) The argument of defendants that the court was justified in dismissing the bill upon the ground that it was not brought in good faith is largely based upon the unwarranted assumption that the court had a right to consider the tender in passing upon their motion. Defendants strenuously argue that to permit plaintiff to succeed upon his motion would wreck a business of twenty-five years'

over the border and returning that decision they desired to take in
reference to the same, and defendants argue that "the decision of
this tender to the plaintiff established that the complaint was not
filed in good faith" that he was "deliberately making use of the
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of treating the motion as a demurrer and upon such a motion all of the
facts well pleaded in the bill are admitted. (Hammatt v. Bank, 143
Ill. 550. See also Leonard v. Arnold, 344 Ill. 429, 431-3; White v.
Nash, 332 Ill. 500, 508.) The argument of defendants that the court
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brought in good faith is largely based upon the unwarranted assumption
that the court had a right to consider the tender in passing upon their
motion. Defendants strenuously argue that to permit plaintiff to
succeed upon his motion would wreck a business of twenty-five years.

standing. It is a sufficient answer to this argument to say that plaintiff's motion was not passed upon by the trial court. Moreover, it does not follow that if the court had denied defendants' motion that plaintiff's motion would have prevailed, especially in view of the tender. When plaintiff's motion is passed upon the trial court, in reaching its judgment, will have a right to take into consideration the tender. In support of the court's action in considering the tender in passing upon their motion, defendants argue that "courts have an inherent power to protect themselves from imposition and may look into facts extraneous to the record for the purpose of so doing." The cases cited in support of this contention have no application to the question before us.

While the record and the admissions of defendants clearly show that the tender practically determined the action of the court in passing upon defendants' motion, nevertheless, defendants argue that the court would have been justified in finding from certain allegations in the complaint that "plaintiff does not come into court with clean hands;" that the trial court had a right to determine therefrom "that he [plaintiff] has been guilty of the same transgressions, if there are transgressions, as has any one of the defendants, and he shows that for a long period of years he has stood silently by, regardless of his duty, and has not only acquiesced but participated in the very actions which he now brands as wrongful." The complaint is based upon the theory that Percy L. Tallman, defendant, completely dominated the other officers, including plaintiff, and the employees of the corporation. In defendants' brief appears the following: "We admit that plaintiff was no more than an office boy, as suggested in plaintiff's brief. We admit that defendant P. L. Tallman has been the guiding and

standing. It is a sufficient answer to this argument to say that plaintiff's motion was not passed upon by the trial court. Moreover, it does not follow that if the court had denied defendant's motion that plaintiff's motion would have prevailed, especially in view of the tender. When plaintiff's motion is passed upon the trial court, in reaching its judgment, will have a right to take into consideration the tender. In support of the court's action in considering the tender in passing upon their motion, defendants argue that "courts have an inherent power to protect themselves from imposition and may look into facts extraneous to the record for the purpose of so doing." This case cited in support of this contention have no application to the question before us.

While the record and the admissions of defendants clearly show that the tender practically determined the action of the court in passing upon defendant's motion, nevertheless, defendants argue that the court could have been justified in finding from certain allegations in the complaint that "plaintiff does not come into court with clean hands;" that the trial court had a right to determine whether "plaintiff [plaintiff] has been guilty of the same transgression, if there are transgressions, as has any one of the defendants, and he shows that for a long period of years he has stood silently by, regardless of his duty, and has not only acquiesced but participated in the very actions which he now brands as wrongful." The complaint is based upon the theory that Percy L. Tallman, defendant, completely dominated the other officers, including plaintiff, and the employees of the corporation. In defendant's brief appear the following: "We admit that plaintiff was no more than an office boy, as suggested in plaintiff's brief. We admit that defendant P. L. Tallman has been the guiding and

dominating force of the corporation." While there are certain allegations in the complaint that may militate against plaintiff upon a trial of the cause, nevertheless, we cannot agree with the contention that the order of the trial court can be sustained upon the ground that the complaint shows upon its face that plaintiff does not come into court with clean hands. Defendants state that some of the charges contained in the complaint might entitle plaintiff to a hearing if it were not for the fact that the filing of the complaint was a fraud upon the court, and throughout their brief they emphasize the effect and importance of the tender in determining whether or not plaintiff comes into court with clean hands.

Defendants contend that the order can be affirmed upon the ground that the complaint is insufficiently verified. This is plainly an afterthought as no such point was made in the motion to dismiss, and it is too late to raise it now. It is, therefore, unnecessary for us to determine whether the complaint is verified in accordance with the provisions of the new Practice Act.

The argument of defendants that if the allegations of the complaint are considered in the light of the tender it becomes evident that it will be practically impossible for plaintiff to prevail in the cause, can have no weight in determining the propriety of the procedure adopted by the trial court.

The order of the Superior court of Cook county is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ORDER REVERSED, AND CAUSE REMANDED
WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

dominating force of the corporation. While there are certain allegations in the complaint that may entitle the plaintiff upon a trial of the case, nevertheless, we cannot agree with the contention that the order of the trial court can be sustained upon the ground that the complaint shows upon the face that plaintiff does not come into court with clean hands. Defendants state that some of the charges contained in the complaint might entitle plaintiff to a hearing if it were not for the fact that the filing of the complaint was a fraud upon the court, and throughout their brief they emphasize the effect and importance of the tender in determining whether or not plaintiff comes into court with clean hands.

Defendants contend that the order can be affirmed upon the ground that the complaint is inherently verifiable. This is plainly an afterthought as no such point was made in the motion to dismiss, and it is too late to raise it now. It is, therefore, unnecessary for us to determine whether the complaint is verifiable in accordance with the provisions of the new Practice Act.

The argument of defendants that if the allegations of the complaint are considered in the light of the tender it becomes evident that it will be practically impossible for plaintiff to prevail in the cause, can have no weight in determining the propriety of the procedure adopted by the trial court.

The order of the superior court of Cook county is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ORDER REVERSED, AND CAUSE REMANDED
WITH DIRECTIONS.

Wright, P. J., and Sullivan, J., concur.

39335

THE FIRST NATIONAL BANK OF
CHICAGO, as Trustee,
Appellee,

v.

HARRY S. LORCH et al.,
Defendants.

HARRY S. LORCH and LORRAINE
LORCH,
Appellants.

62A
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

291 I.A. 618²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An order was entered in the above entitled cause approving the report of the master in chancery as to the sale of the property involved and the distribution of the proceeds from the sale. The order also found that the proceeds of the sale were insufficient to pay the amounts due complainant under the decree and that there was still due it \$12,965.51, which amount included "the fees, disbursements and commissions of said Master and the cost of these proceedings," that "Harry S. Lorch and Lorraine Lorch, his wife, are personally liable to the complainant for such deficiency" and that complainant have execution therefor. Harry S. Lorch and Lorraine Lorch, defendants, appeal.

This cause was before us after the foreclosure decree was entered. (See The First National Bank of Chicago v. Lorch et al., 283 Ill. App. 643, abstract opinion.) It appears from our opinion that plaintiff filed its bill to foreclose a trust deed executed on June 15, 1926, by defendant Melbert W. Lorch to secure sixty-one

20335

THE FIRST NATIONAL BANK OF
CHICAGO, as Trustee,
Appellee,

v.

HARRY S. LORCH et al.,
Debtors.

HARRY S. LORCH and LORCH
LORCH,
Appellants.

MR. JUSTICE CLARK, delivered the opinion of the court.

An order was entered in the above entitled cause approving the report of the master in chancery as to the sale of the property involved and the distribution of the proceeds from the sale. The order also found that the proceeds of the sale were insufficient to pay the amounts due complainant under the decree and that there was still due it \$12,968.51, which amount included "the fees, disbursements and commissions of said master and the cost of these proceedings," that "Harry S. Lorch and Lorraine Lorch, his wife, are personally liable to the complainant for such deficiency" and that complainant have execution therefor. Harry S. Lorch and Lorraine Lorch, defendants, appeal.

This case was before us after the foregoing decree was entered. (See The First National Bank of Chicago v. Lorch et al., 233 Ill. App. 643, abstract opinion.) It appears from our opinion that plaintiff filed its bill to foreclose a trust deed executed on June 12, 1926, by defendant Melbert F. Lorch to secure sixty-one

bonds, aggregating \$30,000; that said Lorch disappeared (apparently a suicide) on October 3, 1926; that by mesne conveyance Harry S. Lorch and Lorraine Lorch became the legal owners of the property; that the cause was referred to a master, who found, inter alia, that bonds Nos. 1 to 9, both inclusive, each in the sum of \$500, had been paid; that bonds Nos. 10 to 31, both inclusive, became due, by their terms, on July 1, 1931; that on January 30, 1932, Harry S. Lorch and Lorraine Lorch entered into a written extension agreement whereby the time of payment of the outstanding bonds was extended until January 1, 1933; that when the bonds matured on that date neither said Lorch nor his wife paid the principal or interest or any part thereof; that the total amount due complainant was \$31,617.53; that by the terms of the extension agreement said Lorch and his wife agreed to pay the principal indebtedness, \$25,500, and interest thereon, and that they were therefore personally liable for the indebtedness in the amount of \$30,398.13; that the exceptions of Lorch and his wife to that part of the master's report finding that they were personally liable for the indebtedness were sustained by the chancellor. Plaintiff, upon the former appeal, contended that the chancellor erred in sustaining said exceptions, and further erred in failing to find in the decree that Lorch and his wife were personally liable for the debt and subject to a deficiency decree and execution. The sole question before us upon that appeal was whether or not the extension agreement made Lorch and his wife personally liable for the debt. In our opinion we recited the provisions of the extension agreement and after considering the question before us held that "the chancellor erred in sustaining defendants' second, third, fourth and fifth exceptions to the master's report, and further erred in not finding in the decree that Harry S. Lorch and Lorraine Lorch were personally liable for the debt and sub-

bonds, aggregating \$30,000; that said bonds were deposited (separately a suicide) on October 3, 1932; that by means conveyed Harry E.

Lorch and Lorraine Lorch became the legal owners of the property; that the cause was referred to a master, the Court, Judge, that bonds Nos. 1 to 9, both inclusive, each in the sum of \$500, had been paid; that bonds Nos. 10 to 31, both inclusive, became due, by their terms, on July 1, 1933; that on January 30, 1933, Harry E. Lorch and

Lorraine Lorch entered into a written extension agreement whereby the time of payment of the outstanding bonds was extended until January 1, 1935; that when the bonds matured on that date neither said Lorch nor his wife paid the principal or interest or any part thereof; that the total amount due complainant was \$31,417.75; that by the terms of

the extension agreement said Lorch and his wife agreed to pay the principal indebtedness, \$30,500, and interest thereon, and that they were therefore personally liable for the indebtedness in the amount of \$30,500.13; that the exceptions of Lorch and his wife as last part of the master's report finding that they were personally liable for the indebtedness were sustained by the Chancellor. Similarly, upon the former appeal, contended that the Chancellor erred in sustaining said exceptions, and further erred in finding in the decree that Lorch and his wife were personally liable for the debt and subject to a deficiency decree and execution. The sole question before us upon that appeal was whether or not the extension agreement made Lorch and his wife personally liable for the debt. In our opinion we rejected the provisions of the extension agreement and after considering the question before us held that "the Chancellor erred in sustaining the exceptions, second, third, fourth and fifth exceptions to the master's report, and further erred in not finding in the decree that Harry E. Lorch and Lorraine Lorch were personally liable for the debt and sub-

ject to a deficiency decree and execution;" that "the decree, in so far as it exempts Harry S. Lorch and Lorraine Lorch from personal liability on the debt, * * * is reversed, and the cause is remanded for further proceedings in conformity with the views herein expressed." The present appellants, Harry S. Lorch and Lorraine Lorch, made no effort to have the Supreme court review our judgment.

Upon the present appeal, appellants "pray this Honorable Court to reverse or modify the decree of the lower Court in so far as it makes defendants liable for fees and costs of the foreclosure proceedings, which is not provided for in the extension agreement." They state: "Conceding that under the decision of this Honorable Court, Cause No. 38295, decided recently, Harry S. Lorch and Lorraine Lorch, appellants herein, who signed the extension agreement, thereby became liable for the debt and for any deficiency decree thereunder, we nevertheless urge that such liability is a limited one and cannot be extended to include attorneys' fees, Master's fees and all other costs and expenses of the foreclosure proceedings." In support of their contention they cite the established rule of law that "attorneys' fees are not recoverable unless they are provided by statute or contract between the parties," and they argue that by the terms of the extension agreement no provision for attorneys' fees, etc., was made therein. In our former opinion we held that appellants "were personally liable for the debt and subject to a deficiency decree and execution." The debt was the indebtedness set forth in the decree of sale, which included principal and interest and the usual and customary costs and expenses incurred in a foreclosure proceeding. Both parties to the cause abided by our opinion and the subsequent proceedings in the trial court followed the mandate of this court. The instant contention is clearly an afterthought. Upon the former appeal plaintiff made the issue perfectly clear.

Upon the former appeal plaintiff made the issue perfectly clear. This court. The instant contention is clearly an afterthought. Subsequent proceedings in the trial court followed the mandate of the court. Both parties to the case abide by our opinion and the usual and customary costs and expenses incurred in a foreclosure proceeding. The decree of sale, which included principal and interest and the costs and execution. The debt was the indebtedness set forth in "were personally liable for the debt and subject to a deficiency" was made therein. In our former opinion we held that appellants of the extension agreement no provision for attorneys' fees, etc., or contrast between the parties," and they agree that by the terms repay, fees are not recoverable unless they are provided by statute their contention that after the established rule of law that "attorneys' fees and expenses of the foreclosure proceedings." In support of be extended to include attorneys' fees, master's fees and all other we nevertheless urge that such liability is a limited one and cannot become liable for the debt and for any deficiency decree thereunder, thereby appellants herein, who signed the extension agreement, thereby Court, Cause No. 88385, decided recently, Harry S. Borah and Lorraine They state: "Accordingly that under the decision of this Honorable proceedings, which is not provided for in the extension agreement." as it makes defendants liable for fees and costs of the foreclosure Court to reverse or modify the decree of the lower Court in so far Upon the present appeal, appellants "urge this Honorable makes no effort to have the Supreme Court review our judgment. ed." The present appellants, Harry S. Borah and Lorraine Lorraine for further proceedings in conformity with the above Lorraine expenses liability on the debt. * * * is reversed, and the decree is remanded as far as it exempts Harry S. Borah and Lorraine Lorraine from personal defect to a deficiency decree and execution;" that "the decree, in

It contended that defendants, by the extension agreement, expressly promised to assume the mortgage debt and to perform whatever terms, provisions and obligations there were in the trust deed and bonds. The trust deed provides that all advances for taxes, attorneys' fees, costs and expenses "shall become so much additional indebtedness secured by the trust deed." The trust deed further provides: "Out of the proceeds of any sale of said premises or any part thereof under any foreclosure of this Deed of Trust shall be paid: (1) All costs of such suit or suits, advertising, sale and conveyance, including solicitors' and Trustees' fees and the cost of documentary evidence and stenographers' charges, as aforesaid. (2) All of the moneys advanced by any person or persons who shall be party or parties to such foreclosure proceedings for taxes, assessments, insurance, repairs, procuring and continuing abstracts of title, title guarantee policy or policies, mechanic's liens, or for any other purpose authorized in this Deed, with interest at the rate of seven per cent (7%) per annum on such advances. (3) * * * The extension agreement provides "that all of the terms, covenants and provisions in said bonds and Trust Deed contained shall stand and remain unchanged and in full force and effect for said extended period," that Lorch and his wife covenant "to keep and perform all of the terms, covenants and provisions of said bonds and Trust Deed as hereby or hereafter modified and of this agreement, and that in the event of default in the performance of any of the terms, covenants and provisions herein, and/or in said bonds and/or said Trust Deed contained, the whole of said principal sum, together with accrued interest thereon shall, at the election of the holder or holders of said bonds, become due and payable and may be collected in the same manner by foreclosure or otherwise in accordance with the terms of said bonds and as provided for in said Trust Deed." There is no merit in the instant

contention.

In the course of their argument counsel for appellants claim that the bid of \$22,000 made by plaintiff for the property at the sale was an arbitrary one, and made only to obtain an oppressive and unconscionable advantage over the appellants. It is probable that this statement is not seriously made, as counsel make no such point in their "Errors Relied Upon," nor do they make it in their "Points and Authorities." In any event, there is no merit in the claim. The record discloses that the trial judge suggested that, for the purpose of aiding him in determining whether or not \$22,000 was a reasonable bid for the property at the sale, an appraisal of the property be obtained from the Chicago Real Estate Board. The parties stipulated that such an appraisal might be admitted in evidence. The appraisal fixed the fair market value of the property, "for an immediate all cash sale," at \$17,500. It would be a sufficient answer to the instant claim to state that the notice of appeal does not raise the point now urged. It is plainly an afterthought. However, the record shows that the chancellor was disposed to protect the rights of all of the parties, and we are unable to say that such a gross inadequacy existed in the bid that the chancellor should have refused approval of the sale. (See Levy v. Broadway-Carmen Building Corp., 366 Ill. 279.)

We have now considered the contentions raised by appellants in their brief. Sometime after all of the briefs were filed in the cause, appellants "moved the Court for leave to file instanter citations of additional authorities," which motion was allowed. What appellants filed was a typewritten brief, in which they raised a new contention, viz:

"It is apparent from the title that the plaintiff, the

contention.

In the course of their argument counsel for appellants claim that the bid of \$23,000 made by plaintiff for the property at the sale was an arbitrary one, and made only to obtain an oppressive and unconscionable advantage over the appellants. It is probable that this statement is not seriously made, as counsel make no such point in their "Errors Relied Upon," nor do they make it in their "Points and Authorities." In any event, there is no merit in the claim. The record discloses that the trial judge suggested that, for the purpose of aiding him in determining whether or not \$23,000 was a reasonable bid for the property at the sale, an appraisal of the property be obtained from the Chicago Real Estate Board. The parties stipulated that such an appraisal might be admitted in evidence. The appraisal fixed the fair market value of the property, "for an immediate all cash sale," at \$17,000. It would be a sufficient answer to the instant claim to state that the notice of appeal does not raise the point now urged. It is plainly an afterthought. However, the record shows that the chancellor was disposed to protect the rights of all of the parties, and was unable to say that such a gross inadequacy existed in the bid that the chancellor should have raised approval of the sale. (See Levy v. Broadway-Garman Building Corp., 300 Ill. 249.)

We have now considered the contentions raised by appellants in their brief. Sometime after all of the briefs were filed in the cause, appellants moved the court for leave to file instant citations of additional authorities, which motion was allowed. That appellants filed was a typewritten brief, in which they raised a new contention, viz:

"It is apparent from the title that the plaintiff, the

First National Bank of Chicago, is only the trustee and not the holder of said bonds or trust deed in question.

"The jurisdiction of a court of equity in foreclosure proceedings to enter a deficiency decree is found in Sec. [Par.] 17, Chapter 95 of the Illinois Revised Statutes, which reads as follows:

"'Decrees for balance - Execution) - #16 [Sec. 16]. In all decrees hereafter to be made in suits in equity directing foreclosure of mortgages, a decree may be rendered for any balance of money that may be found due to the complainant, over and above the proceeds of the sale or sales, and execution may issue for the collection of such balance, the same as when the decree is solely for the payment of money. And such decree may be rendered conditionally, at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due: Provided, that such execution shall issue only in cases where personal service shall have been had upon the defendant or defendants personally liable for the mortgage debt, unless their appearance shall be entered in such suits.' (underlineations ours)

"The words in the statute, above quoted, viz: 'found due to the complainant' are to be strictly construed and must mean only the complainant, who is the owner of the debt and not a mere trustee."

Appellants then argue that plaintiff is not entitled to a deficiency decree, and we are asked to reverse that part of the decree that provides for a deficiency. This brief should have been stricken from the record. Appellants state that the new point was discovered by an examination of authorities after the briefs had been filed. No such point was mentioned in the notice of appeal nor suggested in the briefs. Moreover, the point was not made or suggested upon the former appeal, where the only defense interposed as to the deficiency decree was that the extension agreement did not make appellants personally liable for the debt. In their brief filed in this court upon the present appeal appellants concede that by reason of our former decision they "became liable for the debt and for any deficiency decree thereunder." It is the settled law of this state that a defense not made in the court below cannot be interposed in this court unless it involves a jurisdictional question. In view of the record appellants are not entitled to have the instant point consid-

First National Bank of Chicago, is only the trustee and not the holder of said bonds or trust deed in question.

"The jurisdiction of a court of equity in foreclosure proceedings to order a deficiency decree is found in Ill. Civ. Stat. Chapter 95 of the Illinois Revised Statutes, which reads as follows:

"Whereas for balance - [Section 10] - The [Sec. 10]. In all cases where a decree is made in favor of a mortgagee or mortgagee of money, a decree may be rendered for any balance of money that may be found due to the mortgagee, even in case of the proceeds of the sale on auction, and execution may issue for the collection of such balance, the same as when the decree is made for the payment of money. And such decree may be rendered summarily, at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due. Provided, that such execution shall issue only in cases where personal service shall have been had upon the defendant or defendant personally liable for the mortgage debt, unless their appearance shall be entered in such action." (underlined)

"The words in the statute, above quoted, viz: 'found due to the complainant' are to be strictly construed and mean only the complainant, who is the owner of the debt and not a mere trustee."

Appellants then argue that plain law is not entitled to a deficiency decree, and we are asked to reverse that part of the decree that provided for a deficiency. This brief should have been supported by the record. Appellants state that the new point was discovered by an examination of authorities after the brief had been filed. No such point was mentioned in the notice of appeal nor suggested in the briefs. Moreover, the point was not made or suggested upon the former appeal, where the only defense interposed as to the deficiency decree was that the external agreement did not make appellants personally liable for the debt. In their brief filed in this court upon the present appeal appellants concede that by reason of our former decision they "became liable for the debt and for any deficiency decree thereunder." It is the settled law of this state that a defense not made in the court below cannot be interposed in this court unless it involves a jurisdictional question. In view of the record appellants are not entitled to have the instant point considered.

ered by this court. From anything that we have said in reference to that point we must not be understood as intimating that we consider that there is the slightest merit in it.

The decretal order of the Superior court of Cook county is affirmed.

DECRETAL ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

ered by this court. There is nothing that we have said in reference
to that point we must not be understood as intimating that we
consider that there is the slightest merit in it.
The decretal order of the Superior Court of Cook County

is affirmed.

ROBERT L. OGDEN, CLERK.

Witness, P. J. and William, J., clerks.

39237

ALBERT IZENMAN,
Appellee,

v.

GUY A. RICHARDSON and WALTER
J. CUMMINGS, as receivers etc.
et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

291 I.A. 618³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment against defendants for \$2,500 entered upon the verdict of a jury in an action brought by plaintiff, Albert Izenman, for personal injuries alleged to have been sustained by him February 1, 1935, by reason of the collision of a street car northwest bound on Milwaukee avenue, Chicago, with a wagon which Izenman was driving in a northwesterly direction on said street.

Milwaukee avenue extends southeast and northwest with two street car tracks on it, one for northwest bound cars and the other for southeast bound cars. Ashland avenue intersects Milwaukee avenue 150 or 200 feet southeast of the point of collision. Mautene court runs into Milwaukee avenue from the southwest, a short distance south of where the accident happened. The distance between the east rail of the northwest bound track and the east curb of Milwaukee avenue is about 14 feet. There were no automobiles parked on the northeast side of the street at the time and place in question. Plaintiff, who was in the junk business, was driving a horse attached to a four-wheel wagon about 15 feet long. He sat on the left side of the seat, a little over the front wheel. The accident

ALBERT I. LEMAY,
Appellee.

v.

GUY A. RICHMOND and ALBERT
J. QUINN, as Receivers etc.
et al., Plaintiffs,
CHICAGO CRYSTAL LINE,
Appellants.

IN THE CIRCUIT
COURT, EAST CHICAGO.

291 I.A. 618

MR. JUSTICE SULLIVAN delivered the opinion of the court.

This appeal seeks to reverse a judgment against defendants for \$2,500 entered upon the verdict of a jury in an action brought by plaintiff, Albert I. Lemay, for personal injuries alleged to have been sustained by him February 1, 1935, by reason of the collision of a street car northwest bound on Milwaukee Avenue, Chicago, with a wagon which I. Lemay was driving in a north-easterly direction on said street.

Milwaukee Avenue extends southeast and northwest with two street car tracks on it, one for northwest bound cars and the other for southeast bound cars. Milwaukee Avenue intersects Milwaukee Avenue 180 or 190 feet west of the point of collision. Milwaukee Avenue runs into Milwaukee Avenue from the southeast, about 250 feet south of where the accident happened. The distance between the east rail of the northwest bound track and the east curb of Milwaukee Avenue is about 14 feet. There were no automobiles parked on the northeast side of the street at the time and place in question. Plaintiff, who was in the truck business, was driving a horse-drawn four-wheel wagon about 13 feet long. He sat on the left side of the seat, a little over the front wheel. The accident

happened around 9 or 9:30 a.m. on a nice day. There was no rain, snow or ice, the visibility was good and the street was dry. There was no northwest bound traffic in the vicinity except plaintiff's wagon and the street car. Plaintiff was driving in a northwesterly direction between the street car track and the east curb. He discovered he had gone beyond his objective and that it was necessary to turn around and drive back southeast.

Izenman, the only witness called in his own behalf, testified that just before starting to turn he looked back to see if the traffic was such that he could make a U-turn and that he saw the street car standing just beyond Ashland avenue with the red light against it; that Ashland avenue was 150 to 200 feet to the southeast of him; that, after seeing the street car, he started to make a U-turn; that he turned his horse to the left, crossing the northwest bound track; that, when the horse was on the northwest bound track, he was brought to a stop by the witness to permit four or five southeast bound automobiles to pass; that he had not seen these automobiles approaching before he started to turn; that, when he stopped to permit the automobiles to pass, he looked back to the southeast again and saw the street car about 35 or 40 feet away; that "I hit the horse a little to make the U-turn" and the horse got over to the southeast bound track; that "I heard a noise like, or brakes on the street car, and ringing of the bell;" that he tried to get clear of the northwest bound track but the street car struck his wagon, causing him to fall, first on the left side of the wagon and then to the ground; and that the wagon was not overturned.

The motorman of the street car and two other eyewitnesses, passengers on the car and apparently disinterested, testified substantially that plaintiff was proceeding in a northwesterly direc-

happened around 8 or 9:30 a.m. on a nice day. There was no rain, snow or ice, the visibility was good and the street was dry. There was no northwest bound traffic in the vicinity except Plaintiff's wagon and the street car. Plaintiff was driving in a northeasterly direction between the street car track and the east curb. He discovered he had gone beyond his objective and that it was necessary to turn around and drive back southeast.

Ironman, the only witness called in his own behalf, testified that just before attempting to turn he looked back to see if the traffic was such that he could make a U-turn and that he saw the street car standing just beyond Ashland Avenue with the red light against it; that Ashland Avenue was 150 to 200 feet to the southeast of him; that, after seeing the street car, he started to make a U-turn; that he turned his horse to the left, crossing the northwest bound track; that, when the horse was on the northeast bound track, he was brought to a stop by the attempt to permit four or five southeast bound automobiles to pass; that he had not seen these automobiles approaching before he started to turn; that when he stopped to permit the automobiles to pass, he looked back to the southeast again and saw the street car about 25 or 30 feet away; that "I hit the horse a little to make the U-turn" and the horse got over to the southeast bound track; that "I heard a noise like, or brakes on the street car, and ringing of the bells;" that he tried to get clear of the northwest bound track but the street car struck his wagon, causing him to fall, first on the left side of the wagon and then to the ground; and that the wagon was not overturned.

The motorman of the street car and two other eyewitnesses, passengers on the car and apparently disinterested, testified substantially that Plaintiff was proceeding in a northeasterly direc-

tion with his horse and wagon about midway between the east rail of the northwest bound track and the east curb; that, when the street car, also proceeding in a northwesterly direction, was from 20 to 40 feet to the southeast of the wagon and running at a speed of 15 to 20 miles an hour, plaintiff started to turn his horse to the left across the northwest bound track upon which the street car was approaching; that the motorman sounded his gong, set the brakes of the car, applied the air and sand and put the motor in reverse to stop the street car, but that it struck the left side of the wagon near the front wheel and came to a stop from four to ten feet beyond the point of collision. The testimony of these witnesses for the defendants was corroborated in some respects by that of the conductor of the street car.

The only issue of fact presented is whether plaintiff turned his horse across the track when the street car was standing beyond Ashland avenue, 150 to 200 feet away, with the red light against it or whether he turned his horse across the track when the street car was from 20 to 40 feet from the wagon and running at a speed of 15 to 20 miles an hour so that it could not be stopped in time to avoid the collision. As to this issue defendants strenuously contend that the verdict was against the clear and manifest weight of the evidence, in that plaintiff's testimony stands uncorroborated either by the testimony of any other witness or by the circumstances or probabilities and is contradicted by three unimpeached eyewitnesses, two of whom were entire strangers to the parties. Plaintiff just as strenuously urges that the verdict is amply sustained by the evidence and should not be disturbed, insisting that his testimony was corroborated by the testimony of some of defendants' witnesses and by the physical facts and circumstances as well as by the probabilities. Since the judgment herein must be reversed and the cause remanded

tion with his horse and wagon about midway between the east wall of the northwest bound track and the east curb; that, when the street car, also proceeding in a northerly direction, was from 20 to 40 feet to the southeast of the wagon and running at a speed of 15 to 20 miles an hour, plaintiff started to turn his horse to the left across the northwest bound track upon which the street car was approaching; that the motion caused his horse, not the driver of the car, applied the air and brake and put the motor in reverse to stop the street car, but that it struck the left side of the wagon near the front wheel and came to a stop from 10 to 20 feet beyond the point of collision. The testimony of these witnesses for the defendants was corroborated in some respects by that of the conductor of the street car.

The only issue of fact presented is whether plaintiff turned his horse across the track when the street car was standing beyond Ashland Avenue, 150 to 200 feet away, with the red light against it or whether he turned his horse across the track when the street car was from 20 to 40 feet from the wagon and running at a speed of 15 to 20 miles an hour so that it could not be stopped in time to avoid the collision. As to this issue the evidence strongly tends to show that the verdict was against the clear and manifest weight of the evidence, in that plaintiff's testimony seems more probable than that of the testimony of any other witness or by the circumstances or probabilities and is contradicted by three unimpeached eyewitnesses, two of whom were entire strangers to the parties. Plaintiff just as strenuously urges that the verdict is amply sustained by the evidence and should not be disturbed, insisting that his testimony was corroborated by the testimony of some of defendants' witnesses and by the physical facts and circumstances as well as by the probabilities. Since the judgment herein must be reversed and the cause remanded

on other grounds and will in all likelihood be retried, we refrain from discussing the evidence or its weight.

Defendants complain of the trial court's refusal to give to the jury at their request the following instruction:

"31. If you believe from the evidence in the case that before the plaintiff started to cross defendants' northbound street car tracks, he saw the defendants' car coming from the south, and that he knew he could not cross the tracks without being struck by the car unless it should be stopped or slackened in speed, and so knowingly without using due care for his own safety, he deliberately took the chances of getting across said tracks in safety, then, as a matter of law he cannot recover in this case."

This instruction, plaintiff insists, was properly refused because there was no evidence presented which tended to prove that plaintiff saw the street car at any place other than stopped at Ashland Avenue before he attempted to make his turn across the street car tracks. It is true that no other witness did or could state just where Izenman saw the street car when he turned around and looked, but Izenman testified that he looked back just before turning onto the street car track and at that time saw the street car. Thus plaintiff fixed the time of his looking back as being just before he turned his horse across the northwest bound track and the witnesses for defendants testified that when plaintiff's horse and wagon turned to cross the track, the street car was only from 20 to 40 feet to the southeast of the wagon and moving at a speed of 15 to 20 miles an hour. Therefore, there was evidence tending to show that when plaintiff started to cross the track he saw or should have seen the street car 20 to 40 feet away and that he must have known that his wagon could not cross the track without being struck by the car unless the street car was stopped or its speed slackened. Defendants' theory as embodied in this instruction covered the most essential element in the defense of this action, and the giving of instructions of a general nature dealing with contributory negligence or of instructions

on other grounds and will in all likelihood be retried, we re-
frain from discussing the evidence or its weight.

Defendants' complaint of the trial court's refusal to give

to the jury at their request the following instruction:

"31. If you believe from the evidence in this case that before the plaintiff started to cross defendant's Northbound street car track, he saw the defendant's car coming from the south, and that he knew or could not have known the track was blocked by the car unless it should be stopped or slackened in speed, and so knowingly without using the care for his own safety, he deliberately took the chance of getting across said tracks in safety, then, as a matter of law he cannot recover in this case."

This instruction, plaintiff insists, was properly refused because there was no evidence presented which tended to prove that plaintiff saw the street car at any place other than stopped at defendant's before he attempted to make his turn across the street car tracks.

It is true that no other witness did or could see that plaintiff saw the street car when he turned around and looked, but defendant testified that he looked back just before turning onto the street car track and at that time saw the street car. Thus plaintiff fixed the time of his looking back as being just before he turned his horse across the Northbound street track and the witness for defendant testified that when plaintiff's horse and wagon turned to cross the track, the street car was only from 10 to 40 feet to the southeast of the wagon and moving at a speed of 15 to 20 miles an hour. Therefore, there was evidence tending to show that when plaintiff started to cross the track he saw or should have seen the street car 20 to 40 feet away and that he must have known that his wagon could not cross the track without being struck by the car unless the street car was stopped or its speed slackened. Defendant's theory as embodied in this instruction covered the most essential element in the defense of this action, and the giving of instructions of a general nature dealing with contributory negligence or of instructions

dealing with some other phase of the issues involved did not justify the refusal to give this instruction. As heretofore stated there was evidence tending to prove the defense embraced in this instruction and the defendants were entitled to a specific instruction as to the law applicable to the facts included therein, it then being the province of the jury to determine from all the evidence whether such facts had been sufficiently established. It has been repeatedly held that it is reversible error to refuse to give a specific instruction of this nature applying the law to facts which there was evidence tending to prove. The instruction in question bore upon the crucial question in the case and should have been given. Where evidence is conflicting as to the material facts as it was here, it was particularly important that the instructions should be accurate. (Lyons v. Ryerson & Son, 242 Ill. 409.)

In passing upon an instruction identical with that under consideration in Chicago Union Trac. Co. v. Jacobson, 217 Ill. 404, the court said at pp. 407, 408:

"The third instruction which the defendant requested the court to give and which the court refused to give to the jury, stated that if appellee started to cross the track and saw the car coming from the east at a high rate of speed, and knew that he could not cross the track without being struck by the car unless it should be stopped or slackened in speed, and deliberately took the chances of crossing the track in safety, he could not recover. That was the theory of the defendant, and there was evidence tending to prove it. Counsel for appellee reiterate the rule that negligence is ordinarily a question of fact for the jury, and insist that the instruction would have invaded the province of the jury by telling them that the facts contained in it would prevent a recovery. Negligence is a deduction or conclusion of fact from the facts and circumstances proved in a case, and is generally a question for the jury. But that statement does not mean that the question is not affected or controlled by rules of law. The law prescribes and regulates the rights and duties of all parties in relation to each other, and it is proper for the court to instruct the jury concerning such rights and duties. (North Chicago Electric Railway Co. v. Peuser, 190 Ill. 67.) The instruction was based on the respective rights and duties of the parties at the place where the accident occurred, and the hypothesis of fact was such that the act would be negligent as a matter of law. If teamsters, generally, may drive across street car tracks between street intersections knowing that a collision will be inevitable unless a car is stopped, and intending to take precedence over the car and compel those in charge of the car to

dealing with some other phase of the issue involved did not justify the refusal to give this instruction. As heretofore stated there was evidence tending to prove the defense embraced in this instruction and the defendant was entitled to a specific instruction as to the law applicable to the facts included therein, it then being the province of the jury to determine from all the evidence whether such facts had been or not been established. It has been repeatedly held that it is reversible error to refuse to give a specific instruction of this nature applying the law to facts which there was evidence tending to prove. The instruction in question bore upon the crucial question in the case and should have been given. There was evidence in conflict as to the material facts as it was held; it was particularly important that the instructions should be accurate. (Lyons

v. Ryan 3 Conn. 242 Ill. 400.)

In passing upon an instruction identical with that under consideration in Indiana Union Trust Co. v. Jacobson, 217 Ill. 404, the court said at pp. 407, 408:

"The third instruction which the defendant requested the court to give and which the court refused to give to the jury, stated that if a driver started to cross the track and saw the car coming from the east at a high rate of speed, and knew that he could not cross the track without being struck by the car unless it should be stopped or slowed in speed, and deliberately took the chances of crossing the track in safety, he could not recover. That was the theory of the defendant, and there was evidence tending to prove it. Counsel for appellee stated the rule that would entitle an ordinarily prudent person to cross the track, and that the instruction would have involved the question of the jury's finding that the fact contained in it would present a necessary element in a judgment of fact from the facts and circumstances proved in a case, and is properly a question for the jury. But that statement does not mean that the question is not affected or controlled by rules of law. The law prescribes and regulates the rights and duties of all parties in relation to each other, and it is proper for the court to instruct the jury concerning such rights and duties. (North Chicago Lumber Co. v. Board, 120 Ill. 67.) The instruction was based on the respective rights and duties of the parties at the place where the accident occurred, and the hypothesis of fact was such that the net would be different as a matter of law. If testimony, generally, may drive a motorist out of tracks, but can not drive a motorist out of tracks, and if it will be inevitable unless a car is stopped, and intended to be stopped over the car and compel those in charge of the car to

stop it, the rights of a street car company on its track and of the general traveling public would be invaded and practically destroyed. (North Chicago Electric Railway Co. v. Peuser, supra.) The law does not permit one in such a place to drive in the path of a moving car, relying upon those in charge of the car to stop it and protect him from injury."

Defendants also contend that the court erred in refusing to give at their request the following instruction:

"33. If the jury believe from the evidence that as the plaintiff approached the defendants' tracks, plaintiff saw defendants' car coming and knew that his vehicle would be struck if he kept on across the track; and if you further believe from the evidence that at the time plaintiff saw defendants' car approaching, plaintiff had time and opportunity to stop his vehicle and allow defendants' car to go by; and if you further believe from the evidence that thereupon, and while defendants' car was approaching the plaintiff, plaintiff negligently proceeded to cross the track in front of defendants' car; and if you further believe from the evidence that such attempt on the part of plaintiff so to cross defendants' track in front of the car caused or contributed to the accident in question, then you are instructed that the plaintiff cannot recover."

The legal principles contained in this instruction are covered by instruction 31 and other instructions which were given, and if instruction 31 is given to the jury on a retrial of this cause the necessity for giving instruction 33 will be obviated.

Other points have been urged and considered, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons stated herein the judgment of the circuit court is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Scanlan, J., concur.

stop it, the right of a street car company on its track and of the general traveling public would be invaded and practically destroyed. (North Ohio Electric Railway Co. v. Lerner, supra.) The law does not permit one in such a place to drive in the path of a moving car, relying upon those in charge of the car to stop it and protect him from injury."

Defendants also contend that the court acted in refusing to

give at their request the following instruction:

"33. If the jury believe from the evidence that on the plaintiff approached the defendants' tracks, plaintiff was defendant's car coming and knew that his vehicle could be struck if he kept on across the tracks; and if you further believe from the evidence that at the time plaintiff was defendants' car approaching plaintiff had time and opportunity to stop his vehicle and allow defendants' car to go by; and if you further believe from the evidence that that upon, and while defendants' car was approaching the plaintiff, plaintiff negligently proceeded to cross the track in front of defendants' car; and if you further believe from the evidence that such attempt on the part of plaintiff to cross defendants' track in front of the car caused or contributed to the accident in question, then you are instructed that the plaintiff cannot recover."

The legal principles contained in this instruction are covered by instruction 31 and other instructions which were given, and it is instruction 31 is given to the jury on a recital of this case the necessity for giving instruction 33 will be obviated.

Other points have been urged and considered, but in the view

we take of this case we deem it unnecessary to discuss them. For the reasons stated herein the judgment of the circuit court is reversed and the case remanded for a new trial.

THE COURT: H. V. S. AND C. S. W. J. S.

Witness, P. S., and Coroner, J. S. Coroner.

39384

CURTIS HOOPER,
Appellant,

v.

WARASH AUTOMOTIVE CORPORATION
et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

291 I.A. 618⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse an order of the Superior court entered July 28, 1936, which vacated a judgment on motions of the defendants in the nature of writs of error coram nobis filed more than thirty days after the entry of said judgment. The judgment order entered June 10, 1936, after reciting that the cause came on "to be heard upon the regular trial calendar for trial" found the issues for plaintiff, that "plaintiff is the owner of an undivided half interest" in the property involved "with title in him in fee simple" and that "defendants are guilty of withholding the possession of said property" and ordered that "a writ of possession" issue "to give the plaintiff possession of same."

The defendants filed separate motions in the nature of writs of error coram nobis, but since they were identical in language, it is necessary to set forth only the amended motion to vacate the judgment filed July 24, 1936, by the defendant Foreman State Trust and Savings, which alleged that "this suit was commenced on December 27, 1929," and that appropriate pleas were filed within apt time; that the cause was placed on the regular trial calendar December 2, 1930, and reached upon call of same July 1, 1931, at which time it was stricken from such calendar; that "thereafter, from time to time,

said cause by agreement of all parties was continued, the last order having been entered on October 24, 1934, when, while this cause was still pending and undisposed of," it was continued generally by agreement; that on July 15, 1935, an order was entered by the Executive Committee of the Superior court directing the Clerk of said court "to reassign all pending and undisposed of common law jury cases as of Saturday, July 13, 1935, not noticed, to thirteen common law jury lists, said lists to be known by number only, provided, however, that all common law jury and non-jury causes that have not been noticed for trial within two years from the time of their commencement or from the date of the last order entered therein, as of Saturday, July 13, 1935, should be placed on a special common law calendar;" that by error the clerk of the court "placed this cause on said special calendar, notwithstanding the fact that this was a cause which had been noticed for trial within two years after the time of its commencement and notwithstanding the fact that less than two years had elapsed from the date of the last order entered herein;" that Le Roy Crawford, an attorney, in the office of the attorneys for defendant was delegated to watch the call of this case; that defendant "relied upon the assumption that the Clerk had complied with the order of said Executive Committee, and relied upon the assumption that this cause would not appear upon said special law calendar, for the reasons above set forth, and so made no search for said cause upon said special law calendar and therefore did not watch for the appearance of said cause upon the call of said calendar;" that "as a result thereof, when said cause was called for trial from said special common law calendar on May 13, 1936, and continued to June 10, 1936, neither this movent, nor its attorneys, nor said Le Roy Crawford had any knowledge of the error of the clerk in placing this cause upon said special law calendar,

said cause by agreement of all parties was continued, the last order having been entered on October 12, 1935, when, while this cause was still pending and undisposed of, it was continued generally by agreement; that on July 12, 1936, an order was entered by the Executive Committee of the Superior Court directing the Clerk of said court "to recast all pending and undisposed of common law jury cases as of Saturday, July 1, 1936, not noticed, no further common law jury lists, said lists to be known by number only, provided, however, that all common law jury and non-jury causes that have not been noticed for trial within two years from the time of their commencement or from the date of the last order entered therein, as of Saturday, July 12, 1936, should be placed on a special common law calendar;" that by error the clerk of the court "placed this cause on said special calendar, notwithstanding the fact that this was a trial which had been noticed for trial within two years after the time of its commencement and notwithstanding the fact that less than two years had elapsed from the date of the last order entered herein; that he was directed, as attorney, in the office of the attorney for defendant was delegated to watch the call of this case; that defendant relied upon the assumption that the Clerk had complied with the order of said Executive Committee, and relied upon the assumption that this cause would not appear upon said special law calendar, for the reasons above set forth, and so made no motion for said cause upon said special law calendar and therefore did not appear for the disposition of said cause upon the call of said calendar;" that now, twelve months after said cause was called for trial from said special common law calendar on July 12, 1936, and continued to June 10, 1937, neither this motion, nor the attorney, nor said Mr. Crawford has any knowledge of the error of the clerk in placing this cause upon said special law calendar.

or of the fact that said cause was called for trial on May 13, 1936, and set down for trial on June 10, 1936;" that as a further result thereof "neither this movent nor its attorneys appeared on May 13, 1936, or on June 10, 1936, upon which latter date an ex parte hearing was had and an ex parte judgment was entered against the defendants to said cause;" that neither this defendant, its attorneys nor Le Roy Crawford had notice of the entry of the judgment until July 16, 1936, since which time they "have been diligent in investigating the facts and circumstances surrounding the appearance of this cause on said special calendar and in preparing this motion;" and that this defendant had and has a meritorious defense to plaintiff's action, which defense is as follows: "Plaintiff's claim arises under a quit-claim deed from Liberty Trust and Savings Bank, executed and delivered in December, 1929, after all interest of said bank in the premises in question had been foreclosed in a suit filed in 1927 in the Circuit Court of Cook County, foreclosing a first mortgage for Twenty-five Thousand Dollars (\$25,000) upon the premises in question, to which mortgage the interest of said bank was subject, subordinate and inferior. Said Liberty Trust and Savings Bank was a party defendant served with summons, and filed its appearance and answer therein. In said foreclosure suit there was a decree of sale entered in July, 1927, from which there was a redemption by a decree creditor, who received title through the sheriff's sale upon his decree. In fact and in law, plaintiff has no right, title or interest in the premises involved, or any part thereof."

Plaintiff filed a written motion to strike defendants' motions to vacate, setting forth that the alleged error of fact appeared on the face of the record and that the presumption of law is that the court "was apprised of everything shown by the record at the time of the rendition of the judgment sought to be vacated;" that the alleged error

of the fact that said claim was filed on May 12, 1936, and set down for trial on June 12, 1936; that on a further receipt thereof "neither this record nor its accompanying documents appeared on May 12, 1936, or on June 12, 1936, nor on either date an ex parte hearing was had and an ex parte judgment was entered against the defendant to said cause;" that neither this document, its accompanying nor the key Crawford had notice of the entry of the judgment on May 12, 1936, since which time they have been diligent in investigating the facts and circumstances surrounding the possession of this cause in said apical claim and in particular, this motion; and that the defendant had and has a motion for judgment on the merits, which defense is as follows: "The plaintiff's claim is based upon a claim deed from Liberty Trust and Savings Bank, executed and delivered in December, 1929, after all interest of said bank in the premises in question had been foreclosed in a suit filed in 1927 in the Circuit Court of Cook County, following a lit's mortgage for twenty-five thousand dollars (\$25,000) upon the premises in question, to which mortgage the interest of said bank was subject, subordinate and inferior. Said Liberty Trust and Savings Bank was a party defendant served with summons, and filed its appearance in answer thereto. In said foreclosing suit there was a decree of sale entered in July, 1937, from which there was a bid made by a certain creditor, the received title thereon in the plaintiff's name upon his decree. In fact and in law, plaintiff has no right, title or interest in the premises involved, or any part thereof."

Plaintiff filed a motion to set aside the defendant's motions to vacate, setting forth that the alleged error of fact appeared on the face of the record and that the jurisdiction of law is that the court "was deprived of everything shown by the record as the title of the rendition of the judgment ought to be vacated;" that the alleged error

of fact is not one which would have precluded the court from entering the judgment; that the motion to vacate failed to show that the court was ignorant of any fact that would have precluded the rendition of the judgment; that defendants' motions seek to contradict the record with reference to the findings of the judgment order and failed to show that the defendants were free from negligence and had a meritorious defense; and that the default of the defendants was due to their own negligence in not watching their case or the call of same in the Chicago Daily Law Bulletin. Upon hearing, plaintiff's motion to strike defendants' motions to vacate was denied and the court vacated the judgment as heretofore stated.

The question presented for our determination is whether defendants' motions to vacate and the affidavits in support thereof filed more than thirty days after the entry of the judgment were sufficient to meet the requirements of the motion provided for by section 72 of the Civil Practice act.

The error of fact which is subject to correction by the motion provided for in said sec. 72 of the Civil Practice act must relate to a fact which was unknown to the court and which if known would have precluded the rendition of judgment. (Cramer v. Commercial Men's Association, 260 Ill. 516; Marabia v. Thompson Hospital, 309 Ill. 147.)

Plaintiff brought this action of ejectment against defendants in December, 1929, and the cause was placed upon the regular trial calendar in December, 1930. When it was reached for trial in July, 1931, it was stricken from such trial calendar and thereafter continued from time to time until on October 24, 1934, by agreement of the parties it was continued generally. This case was not within the purview of the order of the Executive Committee of the Superior court of July 15, 1935, directing the clerk of that court to prepare a

special law calendar of all cases that had not been noticed for trial within two years of their commencement or within two years from the date of the last order entered therein. It had been noticed for trial within two years of its commencement and less than a year had elapsed from the date of the last order entered in the cause October 24, 1934, until the special calendar was made up. It is undisputed that it was through the misprision of the clerk that this case was placed upon said special law calendar, from which it was thereafter called for trial, with the result that the ex parte judgment was entered. It has repeatedly been held that a default on the part of the clerk such as occurred here furnishes one of the recognized grounds for relief by a motion in the nature of a writ of error coram nobis where the default leads to action by the court, which it would not have taken had the default not occurred. (Butterick Publishing Co. v. Goldfarb, 242 Ill. App. 228.) "The tendency of our law is to allow a motion under section 89 (Cahill's St., ch. 110, par. 89, [identical with sec. 72 of the Civil Practice act]), whenever it is obvious that the action of the court was based on the fault either of omission or commission of the clerk of the court." (Butterick Publishing Co. v. Goldfarb, supra.)

It is urged that since the judgment order recites that "the cause came on to be heard on the regular trial calendar for trial" defendants by their motion to vacate sought to impeach this portion of the judgment. The rule unquestionably is that the error of fact relied upon to vacate a judgment upon motion made after thirty days from the date of its rendition must not be one appearing on the face of the record or one contradicting the finding of the court. The defendants did not question the fact that the case was called from "the regular trial calendar for trial" or urge that as a ground for vacating the judgment. They concede that it was called for trial

special law of limitation of all cases that have been pending for
trial within two years of their commencement or within two years
from the date of the last order entered therein. It has been held
for trial within two years of its commencement and less than a year
had elapsed from the date of the last order entered in such case
October 23, 1914, until the special calendar was made up. It is un-
disputed that it was within the limitation of the act in that this
case was placed upon said special calendar, from which it was
thereafter called for trial, with the knowledge of the court and
the parties. It was repeatedly said that it was within the
part of the statute such as occurred here inasmuch as one of the
cases pending for trial by a motion in the nature of a writ of error
was pending there and it was held to be within the statute, which is
would not have taken from the calendar, not necessary. (Exhibit 10-
11) Smith v. Smith, 100 Cal. 111, 112, 113, 114, 115, 116, 117, 118,
119 is to give a written statement to (Smith's case). However it
is identical with that of the other cases. It is obvious that the
of omission or commission of the clerk of the court. (Exhibit 11)

Smith v. Smith, 100 Cal. 111, 112, 113, 114, 115, 116, 117, 118, 119

It is urged that since the judgment entered therein that the
case came on to be heard on the regular trial calendar for trial
defendants by their motion to vacate and to have the case set aside
of the judgment. The rule in such cases is that the court of first
resort is to vacate a judgment when it is shown that it is
from the date of its rendition, and as the judgment in the case
of the record or one submitted, the finding of the court. The
defendants did not question the fact that the case was called from
the regular trial calendar for trial on the date that was shown for
vacating the judgment. They concede that it was called for trial

from a "regular trial calendar," but insist that the default of the clerk in improperly placing it upon such special calendar was not an error of fact appearing on the face of the record or one that contradicted any finding of the court. We are of the opinion that the placing of this cause on the special law calendar by the clerk was such an error of fact, which, if known to the court at the time the ^{judgment} ~~ex parte~~ was entered, would have precluded its rendition and impelled the court to strike the cause from such calendar.

Were the defendants guilty of negligence in failing to ascertain that the case was on the special law calendar and should they for that reason be deprived of their right to have the judgment vacated? The order of the Superior court directing the preparation of the special law calendar embraced just two classes of cases and we think that the defendants and their attorneys were justified in assuming that the clerk had performed his duty and had placed on said calendar only cases of the type specified in that order. There was no obligation on their part to examine the special calendar for their case nor to watch the call of that calendar in the Daily Law Bulletin for same. In Beveridge v. Hewitt, 8 Ill. App. 467, where the facts were somewhat similar, the court said at p. 474:

"In this case, when the complainants' attorney ascertained that no trial calendar had been prepared for the January term on which this case appeared, but that the court instead of having such calendar prepared was engaged to a late period in the term in trying another class of causes, he had a right to assume that this suit was not in a situation in which it was liable to be called for trial before another term. Under these circumstances he was not called upon to watch the call of the calendar, and is not chargeable with negligence for failing so to do."

There is no merit in plaintiff's contention that defendants' motions to vacate did not show a meritorious defense. Such a defense was sufficiently shown. The defendants alleged that plaintiff's claim was based upon a quitclaim deed executed by a grantor after that grantor's interest had been foreclosed in a suit to foreclose a mortgage

from a "special trial calendar," but that the fact of
the clerk in improperly placing it upon such special calendar was
not an error of fact appearing on the face of the record, and that
consequently any finding of the court, as one of the calendar that
the placing of this case on the special calendar by the clerk
was such an error of fact, which, if shown to the court at the time
the ex parte was entered, would have precluded its admission and
imposed the court to strike the same from the calendar.
Were the defendant's right of negligence in failing to secure
that the case was on the special calendar and showing why for
that reason he deprived of their right to have the judgment vacated?
The order of the Superior Court directing the preparation of the special
law calendar embraced that the clerk of court and he think that the
defendants and their attorney were justified in assuming that the clerk
had performed his duty and had placed on the calendar the case of
the type specified in that order. There was no collection on their
part to examine the special calendar for their case nor to watch the
call of that calendar in the daily collection for cases. In Reveries
v. Hewitt, 8 Ill. App. 3d, 1927, where the issue was somewhat similar, the
court said at p. 474:
"In this case, then, the complainant's attorney ascertained
that no trial calendar had been prepared for the coming term and
which this case appeared, but that the court in view of having a non
calendar prepared was moved to a later session in the term in which
another case of course, to have it. It seems that this case was
not in a situation in which it was liable to be called for trial before
another term. Under these circumstances it was not called upon to
watch the call of the calendar, and is not responsible for its failure
for failing to do so."
There is no merit in plaintiff's contention that defendants
had no right to vacate the judgment. The defendant's claim
was sufficient to show that the defendant's claim was sufficient
to show upon a sufficient showing that the defendant's claim was
sufficient to show that the defendant's claim was sufficient to show

on the premises involved and that plaintiff can prevail only upon the strength of his own title. (Allott v. Wilmington Power Company, 283 Ill. 541.)

The mistake of the clerk was solely responsible for the entry of the ex parte judgment which the court below vacated, and its action in so doing, to enable the defendants to interpose their defense upon the trial of the issues, is in accord with established principles of law. Other points are urged but in the view we take of this appeal we deem it unnecessary to discuss them.

The order of the Superior court which denied plaintiff's motion to strike defendants' motions in the nature of writs of error coram nobis to vacate the judgment and which vacated such judgment is affirmed.

ORDER AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

39408

PETER WEINBERG,
Appellant,

v.

GUY A. RICHARDSON, as receiver,
etc., et al.,
Appellees.

65A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

291 I.A. 618⁵

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment entered pursuant to a verdict directed for defendants at the close of plaintiff's case in an action brought for damages resulting from personal injuries alleged to have been sustained by plaintiff in a collision between his automobile and defendants' street car.

In sustaining defendants' motion that the jury be instructed to find them not guilty, the trial court said: "I am ruling here you have not proved a case. That is to say, I don't think you have proved any negligence on the part of the street car company *** I am ruling you have not made any case against the defendants." In response to a question by plaintiff's counsel, the trial judge also stated that he was not ruling "on the subject of contributory negligence."

Plaintiff contends that there was ample evidence of negligence on the part of the defendants and that the court erred in directing a verdict. The defendants insist that there was no evidence fairly and reasonably tending to prove that they were guilty of negligence which proximately caused the injuries of which plaintiff complains and that the court did not err in directing a verdict

WALTER WINSTON,
Plaintiff,

v.

JOHN A. WINSTON, as executor,
etc., et al.,
Appellees.

WALTER WINSTON

COUNT, COOK COUNTY.

20438

MR. JUSTICE SULLIVAN delivered the opinion of the court.

This appeal seeks to reverse a judgment entered pursuant to a verdict directed for defendants at the close of plaintiff's case in an action brought for damages resulting from personal injuries alleged to have been sustained by plaintiff in a collision between his automobile and defendant's street car.

In sustaining defendant's motion that the jury be instructed to find them not guilty, the trial court said: "I am ruling that you have not proved a case. That is to say, I don't think you have proved any negligence on the part of the street car company and I am ruling you have not made any case against the defendants." In response to a question by plaintiff's counsel, the trial judge also stated that he was not ruling "on the subject of contributory negligence."

Plaintiff contends that there was ample evidence of negligence on the part of the defendant and that the court erred in directing a verdict. The defendant insists that there was no evidence fairly and reasonably tending to prove that they were guilty of negligence which proximately caused the injuries of which plaintiff complains and that the court did not err in directing a verdict.

for them. Thus the only question presented by the parties for our determination is whether the evidence with all of its reasonable inferences and considered in its most favorable light to plaintiff made out a case for him which should have been submitted to the jury.

Plaintiff, the only occurrence witness presented, testified that on the night of October 27, 1932, he was driving his automobile at a speed of about fifteen miles an hour in a westerly direction in the westbound street car track on 14th street; that he came up to a slow moving horse and wagon about a half block east of Ashland avenue; that to pass same he turned his automobile into the eastbound street car track because there were holes in the pavement of the street between the westbound street car track and the north curb and it was "bumpy"; that before turning from behind the wagon to drive west in the eastbound track he saw the light of an approaching eastbound street car, which was at that time about 600 feet or a block to the west; that he increased his speed to sixteen miles an hour to pass the horse and wagon; that he continued to drive at that speed until he had passed the horse and wagon and reached a point at or near the west line of Ashland avenue, when he turned his automobile in a northwesterly direction to go back on the westbound track; that the front wheels of his automobile turned from the rails of the eastbound track "promptly", but that the rear wheels stayed in said track, sliding or skidding along on same about fifteen feet to the west; that when the rear wheels of his automobile left the eastbound track, the front of the street car was about fifteen feet to the west; that he was still steering in a northwesterly direction but the "hind wheels came over so fast it just jerked the front wheels right around;" that after his

for them. Thus the only question presented by the evidence for our determination is whether the evidence with all of its contradictions

and inferences and contradictions in its most favorable light to plaintiff made out a case for him which should have been submitted to the jury.

Plaintiff, the only occurrence witness presented, testified that on the night of October 27, 1937, he was driving his automobile at a speed of about fifteen miles an hour in a westerly direction in the westbound street car track on 14th Street; that he came up to a slow moving horse and wagon about a half block east of Highland Avenue; that to pass same he turned his automobile into the eastbound street car track because there were holes in the pavement of the street between the westbound street car track and the north curb and it was "bumpy"; that before turning from behind the wagon to drive west in the eastbound track he saw the light of an approaching eastbound street car, which was at that time about 600 feet or a block to the west; that he increased his speed to sixteen miles an hour to pass the horse and wagon; that he continued to drive at that speed until he had passed the horse and wagon and reached a point at or near the west line of Highland Avenue, when he turned his automobile in a northerly direction to go back on the westbound track; that the front wheels of his automobile turned from the rails of the eastbound track "bumpily", but that the rear wheels stayed in said track, sliding or skidding along on same about fifteen feet to the west; that when the rear wheels of his automobile left the eastbound track, the front of the street car was about fifteen feet to the west; that he was still steering in a northerly direction but the "hind wheels came over to last it just jerked the front wheels right around"; that after this

automobile swerved, the left front fender and wheel of same "came in contact with the street car at the corner post, just back of the front platform;" that his automobile came to a stop about thirty feet west of Ashland avenue; that it stopped right where the collision occurred; and that when his automobile "came to a stand still" it was against the street car and remained that way.

For a clearer understanding of the evidence before the trial court as to how far distant the street car was from plaintiff's automobile at the various stages of their approach to each other and the speed at which the street car was travelling between the time plaintiff turned into the eastbound track and the time his rear wheels left said track, we deem it necessary to set forth same fully. As to these matters, plaintiff testified that when he turned his automobile to go back to the westbound track, he was "just opposite of Ashland avenue" and the street car was "about 300 feet away;" that "the street car was coming up fast;" that "I tried to get out, when I did get out of the track, the street car was right on top of me"; that "when I got the rear wheels out all right, steering, while the street car came up on top of me, ran into the side of the street car;" that he did not "see the street car make any change in its speed" and could not say whether it "did make a change;" that when his automobile was at the west side of Ashland avenue the street car was 300 feet or one-half block away to the west; that the inside lights and the headlight of the street car were "burning" and he not only saw it coming but he also heard it coming; that the street car kept on coming but that he did not know at what speed it was coming; that it was "pretty hard" to judge the speed of the street car as it was coming toward him; that when he started to drive around the horse and wagon, the front end

automobile arrived, the left front wheel and head of same came in contact with the street car at the corner point, just back of the front platform; that the automobile came to a stop about thirty feet east of Ashland Avenue; that it stopped right where the collision occurred; and that when the automobile "came to a stand still" it was against the street car and remained that way.

For a clearer understanding of the evidence before the trial court as to how far distant the street car was from Plaintiff's automobile at the various stages of their approach to each other and the speed at which the street car was traveling between the time Plaintiff turned into the eastbound track and the time his rear wheels left said track, we deem it necessary to set forth same fully. As to these matters, Plaintiff testified that when he turned his automobile to go back to the eastbound track, he was "just opposite of Ashland Avenue, and the street car was 'about 300 feet away'; that 'the street car was coming up fast'; that 'I tried to get out, when I did get out of the track, the street car was right on top of me'; that 'when I got the rear wheels out all right, steering, while the street car came up on top of me, ran into the side of the street car'; and he did not 'see the street car make any change in its speed'; and could not say whether it 'did make a change'; that when the automobile was at the west side of Ashland Avenue the street car was 300 feet or one-half block away to the west; that the witness noticed the leading light of the street car were 'burning'; and he did not see it coming but he did heard it coming; that the street car kept on coming but that he did not know at what speed it was coming; that it was 'pretty hard' to judge the speed of the street car as he was looking toward it; that when he started to drive around the corner and wagon, the front end

of the street car was about 300 feet away or "about in the middle of the block;" that as he drove up even with the horse and wagon the street car was about 150 or 200 feet to the west; that when he started to drive back into the westbound track, the street car was "coming up close on me then *** I would say about fifty feet away;" and that he was never able to estimate the speed of the street car at any particular time.

We have carefully examined plaintiff's entire testimony to ascertain if there was any evidence tending to show that the motorman of the street car did anything which he should not have done or that he failed to do anything which he should have done in the exercise of ordinary care after the possibility of danger to the plaintiff became or should have become apparent to him. There is no evidence in the record tending to show negligence on the part of defendants' motorman.

We concur with the statement in plaintiff's brief that "if the wheels of the automobile had not skidded upon the street car track and delayed it from leaving the eastbound rails, the plaintiff's automobile would have cleared the eastbound street car tracks in ample time to have permitted the street car to proceed in an easterly direction without even slackening speed." Therefore we may pass on to the point where plaintiff, after having passed the horse and wagon, turned from the eastbound track to go back to the westbound track and the rear wheels of his automobile commenced to slide or skid upon the eastbound track. It must be and is conceded that up to that point plaintiff was in neither real nor apparent danger. At one point in his testimony plaintiff stated that when he turned from the eastbound track the street car was about 300 feet away, "coming up fast," and then again he testified that when he

of the street car was about 300 feet away or about in the middle of the block; that as he drove up over with the horse and wagon the street car was about 150 or 200 feet to the west; that when he started to drive back into the westbound track, the street car was "coming up close on me from the east" I would say about fifty feet away; and that he was never able to estimate the speed of the street car at any particular time.

He has carefully examined Plaintiff's entire testimony to ascertain if there was any evidence tending to show that the motion of the street car was such that it should not have been or that he failed to do so, which he should have done in the exercise of ordinary care after the possibility of danger to the Plaintiff became or should have become apparent to him. There is no evidence in the record tending to show negligence on the part of defendants, moreover.

We compare with the statement in Plaintiff's brief that the wheels of the automobile had not skidded upon the street car track and delayed it from leaving the eastbound rails, the Plaintiff's automobile would have cleared the eastbound street car track in ample time to have permitted the street car to proceed in an easterly direction without even slackening speed. Therefore we may pass on to the point where Plaintiff, after having passed the horse and wagon, turned from the eastbound track to go back to the westbound track and the rear wheels of his automobile commenced to slide or skid upon the westbound track. It would be said in connection with that up to that point Plaintiff was in no danger of being injured. At one point in his testimony Plaintiff stated that when he turned from the eastbound track the street car was about 25 feet away, "coming up fast," and then again he testified that when he

started to drive around the horse and wagon into the eastbound track, the street car was about 300 feet away, that when he drove up even with the horse and wagon the street car was about 150 or 200 feet away, that when he turned out of the eastbound track the street car was about fifty feet away and that when the rear wheels of his automobile left the eastbound track, after sliding along same for fifteen feet, the street car was about fifteen feet away to the west.

After plaintiff's automobile commenced to skid and continued to skid up to the time its rear wheels left the eastbound track, was defendants' motorman chargeable with any duty which he did not observe and perform? It is true that plaintiff was lawfully upon the eastbound track with his automobile and that the duty of the motorman under the law required him to keep a vigilant lookout to avoid persons lawfully in the street. Granting that the evidence showed that without fault on his part plaintiff was suddenly placed in a position of peril because of the unlooked for circumstance of the skidding of his automobile and that the circumstances in evidence were such as to prove or tend to prove that the motorman had an opportunity to become conscious of his duty to avoid injury to plaintiff by stopping or slackening the speed of the street car and a reasonable opportunity to perform such duty, wherein can it be said that there was any evidence that he failed to perform his duty? The street car did not strike the automobile or any part of it while it was on the eastbound track and, regardless of its speed at the time the automobile began to skid and during the course of its skidding, it was still fifteen feet away when the rear wheels of the automobile cleared said eastbound track. That the motorman had brought the street car to a standstill or practically to a standstill at a point west of where the rear wheels of the automobile left the eastbound street car

started to drive around the horse and wagon into the eastbound track, the street car was about 300 feet away, and when it drove up even with the horse and wagon the street car was about 150 or 200 feet away, and when he turned out of the westbound track the street car was about fifty feet away and then the rear wheel of his automobile left the eastbound track, after which it went some ten to fifteen feet, the street car was about fifteen feet away to the west.

After Plaintiff's automobile commenced to skid and continued to skid up to the time the rear wheel left the eastbound track, was defendants' testimony that he did not observe and perhaps it is true that Plaintiff was lawfully upon the eastbound track with his automobile and that the duty of the motor man under the law required him to keep a vigilant lookout to avoid persons lawfully in the street. Granting that the evidence showed that without fault on his part Plaintiff was suddenly placed in a position of peril because of the unlocked for circumstances of the skidding of his automobile and that the circumstances in evidence were such as to prove or tend to prove that the defendant had an opportunity to become conscious of his duty to avoid skidding Plaintiff by stopping or slackening the speed of the street car and a reasonable opportunity to perform such duty, Weinstein can it be said that there was any evidence that he failed to perform his duty? The street car did not strike the automobile or any part of it while it was on the eastbound track and, regardless of the speed at the time the automobile began to skid and during the course of its skidding, it was still fifteen feet away when the rear wheel of the automobile cleared said eastbound track. That the defendant had the right of way as to a standstill or practically to a standstill at a point west of where the rear wheel of the automobile left the eastbound street car

track
/ is shown by the fact that after the automobile which was being driven from said eastbound track in a northwesterly direction, swerved to the south or west or southwest, striking the street car at the rear of its front vestibule, it "came to a standstill" against the street car and "remained that way." If in the first place the automobile had not skidded and in the second place it had not swerved and changed its course after its rear wheels had left the eastbound track there would have been no collision. The pavement was dry and there was no evidence that the skidding of plaintiff's automobile was caused by the condition of same nor was there any evidence as to what the condition of the pavement was at the particular place where the skidding occurred or as to what caused the skidding. In plaintiff's brief we find the statement that "for some reason or other the tires on his rear wheels skidded." The street car did not run into nor strike against plaintiff's automobile because of its speed or because of any other alleged negligence while the automobile was on or leaving the eastbound track, and it seems clear that the skidding and swerving of the automobile was the sole proximate cause of the collision, the street car, which had stopped or practically stopped, merely by its presence in the path of the automobile furnishing the occasion for such proximate cause to act. "The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act." (Phillabaum v. Lake Erie & Western Railroad Co., 315 Ill. 131, 136.) Even though the street car was moving at the time of the collision, there was no reason for the motorman to apprehend danger if he slowly passed the automobile after it had left the eastbound track, and the motorman in the exercise of ordinary care was not required to anticipate that plaintiff's automobile, having cleared the eastbound track, would suddenly veer and change its course and run into the street car.

track
back

by the fact that the automobile which was being driven from said apartment was in a southerly direction, answered to the south or west or southwest, striking the street car at the rear of its front vestibule, it being a southerly against the street car and "remained fast" as it is the fact place the automobile had not shifted and in the second place it had not swerved and changed its course after the rear wheels had left the eastbound track (there would have been no collision). The pavement was dry and there was no evidence of the sliding of Plaintiff's automobile was caused by the friction of tires on wet pavement. Evidence as to what the condition of the pavement was at the particular place where the sliding occurred or as to what caused the sliding. In Plaintiff's brief to find the defendant liable for some reason or other the case on the facts is decided. The street car did not run into the strike against Plaintiff's automobile because of its speed or because of any other alleged negligence while the automobile was on or leaving the eastbound track, and it seems clear that the sliding and striking of the automobile was due to the proximate cause of the collision, the street car, which had stopped or practically stopped, merely by its presence in the path of the automobile furnishing the occasion for such proximate cause to act. "The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal relation to act." (Illinois v. State, 111 Ill. 213, 214.) And though the street car was moving at the time of the collision, there was no reason for the defendant to apprehend danger if he simply passed the automobile after it had left the eastbound track, and no movement in the exercise of ordinary care was not required to anticipate that Plaintiff's automobile, having crossed the eastbound track, would suddenly rear and change its course and run into the street car.

We have carefully examined and considered the authorities relied upon by plaintiff, but in none of them are the facts comparable to the facts in the case at bar. The automobile or wagon in each of the cases cited which was on or in close proximity to the street car track was actually struck by the street car while so situated and it would therefore serve no useful purpose to discuss such cases.

Inasmuch as plaintiff failed to produce any evidence fairly and reasonably tending to prove that the motorman of the street car was negligent, it was the duty of the trial court to direct the verdict.

The judgment of the Superior court is therefore affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

one such case.

was negligent, it was the duty of the United States to have the

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39444

OCTAVIA BENTON,
Appellee,

v.

CLARENCE MARR,
Appellant.

APPEAL FROM SUPERIOR COURT,
COCK COUNTY.

291 I.A. 619¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$750 entered June 22, 1935, in favor of plaintiff, Octavia Benton, and against defendant, Clarence Marr, and from the order entered July 13, 1933, denying defendant's motion for a new trial.

Plaintiff's complaint charged defendant with an assault and battery against her on August 20, 1933. Defendant's answer denied the averments of the complaint and he filed an amendment to his answer alleging self-defense. He also filed a counterclaim charging that plaintiff assaulted him the same day. The complaint was filed March 16, 1934, and the cause was reached for trial on the morning of June 20, 1935, when a jury was impaneled and sworn and the trial proceeded without objection or request for continuance by the defendant. After plaintiff had rested her case on that day the court asked counsel for defendant: "Are you ready to proceed with your defense?" Counsel responded: "Your honor I will go as far as I can, I tried to get the doctor who attended Mr. Marr and he is a very material witness." The defendant then testified and at the conclusion of his testimony the court adjourned and the trial went over until the next day. Upon the opening of court the following morning defendant's counsel presented a motion

3044

FOR THE DEFENSE,
JAMES H. HARRIS,
Counsel.

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WILLIAM H. HARRIS,
Counsel.

WILLIAM H. HARRIS,
Counsel.

WILLIAM H. HARRIS,
Counsel.

1911 A.D.

MR. JUSTICE HARRIS: WILLIAM H. HARRIS, COUNSEL FOR THE DEFENSE.

THIS IS my second time to appear for the defense.

On 1901, in town of Alameda, California, was a woman.

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for a continuance of the cause because of the absence of a witness whose testimony it was claimed was material. This motion was denied and the trial proceeded to its conclusion June 21, 1935, the verdict of the jury being returned and judgment entered thereon June 22, 1935. Thereafter, July 2, 1935, defendant filed a written motion for a new trial, which was set for hearing July 15, 1935, and denied on that day. It is contended that the trial court erred in not allowing defendant's motion for a short continuance because of the absence of a material witness. In our opinion there is no merit in this contention and it was not error to deny a continuance after the plaintiff's evidence was before the jury. (Keith v. Knoche, 43 Ill. App. 161.)

Rule 14 of the Rules of Practice and Procedure of the Supreme court in so far as it pertains to applications for continuance because of the absence of material evidence is as follows:

"(1) When either party shall apply for a continuance of a cause on account of the absence of material evidence, the motion shall be supported by the affidavit of the party so applying or his authorized agent, showing that due diligence has been used to obtain such evidence, or the want of time to obtain it, and of what particular fact or facts the same consists, and if the evidence consists of the testimony of a witness, his place of residence, or if his place of residence is not known, showing that due diligence has been used to ascertain the same, and that if further time is given such evidence can be procured.

"(2) Should the court be satisfied that such evidence would not be material, or if the other party will admit the affidavit in evidence as proof only of what the absent witness would testify to if present, the continuance shall be denied unless the court, for the furtherance of justice shall deem a continuance necessary."

In our opinion this rule contemplated that the application for the continuance provided for therein must be presented before the commencement of the trial. Otherwise our practice would be reduced to a state of chaos. Uncertainty and lack of uniformity in our procedure would prevail rather than certainty and uniformity. If the trial court could be held to have abused its discretion in the

instant case in denying defendant's application for a continuance made after plaintiff had introduced her evidence and rested her case and the defendant had testified, it would follow that every litigant who presents at any stage of his trial a motion for continuance supported by an affidavit in conformity with the rule heretofore set forth must be granted such a continuance as a matter of right. Such is not law. It may well be that some emergency or extraordinary situation might arise after a trial is in progress that would justify a court in the exercise of its sound discretion in continuing a cause in furtherance of justice, but this is not such a case.

Defendant's affidavit filed in support of his motion convicts him of utter lack of diligence in the presentation of such motion. Therein it is stated: "That the said R. Allen [the absent witness] was in the City of Evanston last week prior to this cause being on the trial call for the day of June 20, 1935; that Dr. Allen nor this defendant at the time knew that the said cause would be reached for trial June 20, 1935, and that said Dr. Allen stated that he the said Dr. Allen was taking a trip to some town in Iowa, the exact location to this defendant is not known." According to this affidavit defendant had knowledge not only on the morning of June 20, 1935, prior to the commencement of the trial, that the witness was absent and would not be available but he knew of such absence for a week before the trial began. Courts cannot countenance the practice of permitting a party to acquiesce in a case going to trial and then during the course of same, because possibly he is not satisfied with the outlook, allowing him to abruptly terminate it by a motion for a continuance as was sought to be done in this cause. Under the circumstances defendant was neither entitled to a continuance nor to have read to the jury his affidavit as to what facts the absent

witness, if present, would testify to. The affidavit was of no more legal effect than if it had not been filed.

It is next urged that remarks of plaintiff's counsel in their closing argument to the jury were prejudicial to defendant.

We have carefully examined the closing arguments of counsel and found nothing therein of such a prejudicial character as to warrant reversal.

In support of his motion for a new trial the defendant sought to introduce in evidence the testimony of four other witnesses besides that of the absent witness heretofore referred to. These witnesses were not permitted to testify, but the court allowed their affidavits to be filed. None of them were witnesses to the occurrence. It is claimed that the court erred in refusing to grant a new trial on the strength of such affidavits. What has been heretofore stated disposes of the necessity of further consideration of the witness Allen and the affidavits as to his testimony. The affidavits of the other four witnesses presented as containing newly discovered evidence sufficient to justify defendant's right to a new trial are concerned only with the nature and extent of plaintiff's injuries. There was no showing that the testimony of these witnesses could not have been procured at the time of the trial and in any event it would only tend to mitigate the damages. "It cannot be the practice of courts to allow important matters to go to trial, and because one party is not satisfied with the results of it let him go out and try to get facts which will enable him to do better at another trial, and rely upon such after-ascertained matters as a basis for a new trial. In such case the courts require that the newly discovered evidence shall be material and shall not be cumulative, and that due diligence has been exercised to procure it." (Graham v. Magmann, 270 Ill. 252.) It clearly appears that defendant was not entitled to a new trial on

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Major Lloyd Jones 1742 Ave. 11th St. N. Wash. D.C. 20004

doi:10.1017/S0022292410000516 To cite this article, please refer to the journal page.

Approved by the Board of Directors, _____

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1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

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doi:10.1017/S0022292415001445 Published online by Cambridge University Press

11. *Journal of the American Medical Association*, 1977; 237: 1001-1002.

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the ground of newly discovered evidence. In discussing the question of newly discovered evidence in Graham v. Haggmann, supra, the court said at pp. 261, 262:

"It is the duty of a party to use due diligence to procure all of his evidence at the time of the trial, and unless it appears that he has used such diligence and been unable to procure the evidence, a new trial will not be granted on those grounds. (Pronkevitch v. Chicago and Alton Railway Co., 232 Ill. 136; Kimber v. Burns, 253 id. 343; Springer v. Schultz, 205 id. 146.) It must be of a conclusive character, material to the issue and relate to the merits of the case. (Crozier v. Cooper, 14 Ill. 139; People v. McCullough, 210 id. 488; People v. Williams, 242 id. 197.) It is not sufficient that it tends to impeach a witness (Chicago and Eastern Illinois Railroad Co. v. Stewart, 203 Ill. 323,) or is merely cumulative to the evidence already offered, (People v. Williams, supra,) or such as merely tends to mitigate the damages, unless it is practically conclusive that only nominal or slight damages should have been allowed where heavy damages have been recovered. (Schlenker v. Risley, 3 Scam. 483; Manix v. Malony, 7 Iowa, 81.) The evidence must have been discovered since the trial, and where it consists of the evidence of other persons who were present at the time the accident or controversy occurred, it must be shown that such facts could not have been ascertained by reasonable inquiry and the exercise of due diligence."

For the reasons herein stated the judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

9177

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 619²

BE IT REMEMBERED, that afterwards, to-wit: On JUN 30 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

• • • • •

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1937.

THE PEOPLE OF THE STATE OF)	
ILLINOIS,)	
)	
Appellant,	)	APPEAL FROM THE COUNTY
)	
vs.	)	COURT OF LAKE COUNTY.
)	
SYLVESTER ROMANOWSKI,)	
)	
Appellee.)	

DOVE, J.

Harriet Andrzejewski filed a bastardy complaint in the County Court of Lake County on July 21, 1936, charging that the defendant was the father of her female child born on July 11, 1936. The defendant entered a plea of not guilty, a trial was had before the court and jury, resulting in a verdict finding the defendant not guilty, upon which judgment was rendered and the record is in this court for review.

There is no complaint made concerning the rulings of the trial court upon the admission or rejection of evidence or upon the instructions given or refused by the trial court, but it is earnestly insisted by counsel for The People that the verdict is manifestly against the weight of the evidence and that the trial court erred in refusing to grant appellant's motion for a new trial.

IN THE
COURT OF THE JUDICIAL
SECOND DEPARTMENT

NEW YORK, N.Y. 1907.

THE PEOPLE OF THE STATE OF
ILLINOIS,
vs.
SYLVANUS J. BOVE,
Defendant.
Appears from the County
Court of Lake County.

BOVE, J.

Heretofore, I filed a judgment in the
County Court of Lake County on July 21, 1907, ordering that the
defendant was the father of her female child born on July 11, 1906.
The defendant entered a plea of not guilty, a trial was had before
the court and jury, resulting in a verdict finding the defendant
not guilty, upon which judgment was rendered and the record is in
this court for review.

There is no complaint made concerning the rulings of the
trial court upon the admission or rejection of evidence or upon the
instructions given or refused by the trial court, but it is
earnestly insisted by counsel for the People that the verdict is
manifestly against the weight of the evidence and that the trial
court erred in refusing to grant appellant's motion for a new trial.

The prosecuting witness testified that she was nineteen years of age and had known appellee for three or four years previous to the trial which occurred on September 9, 1936, that she had gone out with him on various occasions covering a period of fifteen months, that she was with him in March, 1935 and that, from time to time, he took her home from dances, that on the evening before Thanksgiving day, 1935, she attended a party at which there were about thirty people present, at the home of Mrs. Nettie Basowski, who lived in a four room apartment, that about ten thirty or eleven o'clock that evening appellee and several other fellows came there, that they sat around drinking and playing various games, one of which was called "post-office". This game is played by a boy or a girl remaining in a room alone and then one of the opposite sex is called in and they kiss, and the one who is called in remains while the other leaves and then another of the opposite sex is called. How long this game had been in progress does not appear, but upon this particular evening the name of the prosecuting witness was called and she entered the room and there found appellee and they there had sexual intercourse as a result of which she became pregnant and gave birth to a child on July 11, 1936. The prosecuting witness further testified that she had had sexual intercourse with appellee at other times and places, both before and after the time at Mrs. Basowski's, that her menstrual period was due about Thanksgiving time, that she didn't menstruate in November, 1935 and did not from that time until after the baby was born, while previously her periods had been regular. She further testified that some four years before the trial she had had sexual intercourse with another party once, but other than this once appellee was the only person with whom she had ever had sexual intercourse. She further testified that she wrote appellee a note and letter in January, 1936, explaining her

The prosecuting witness testified that she was nineteen years of age and had known appellee for three or four years previous to the trial which occurred on September 9, 1936, that she had gone out with him on various occasions covering a period of fifteen months, that she was with him in March, 1935 and that, from time to time, he took her home from dances, that on the evening before Thanksgiving day, 1935, she attended a party at which there were about thirty people present, at the home of Mrs. Nettie Pasowski, who lived in a four room apartment, that about ten thirty or eleven o'clock that evening appellee and several other fellows came there, that they sat around drinking and playing various games, one of which was called "post-office". This game is played by a boy or a girl remaining in a room alone and then one of the opposite sex is called in and they kiss, and the one who is called in remains while the other leaves and then another of the opposite sex is called. Now from this game had been in progress does not appear, but upon this particular evening the name of the prosecuting witness was called and she entered the room and there found appellee and they there had sexual intercourse as a result of which she became pregnant and gave birth to a child on July 11, 1936. The prosecuting witness further testified that she had had sexual intercourse with appellee at other times and places, both before and after the time at Mrs. Pasowski's, that her menstrual period was due about Thanksgiving time, that she didn't menstruate in November, 1935 and did not from that time until after the baby was born, while previously her periods had been regular. She further testified that some four years before the trial she had had sexual intercourse with another party once, but other than this once appellee was the only person with whom she had ever had sexual intercourse. She further testified that she wrote appellee a note and letter in January, 1936, explaining her

condition, but did not speak to him in person about being pregnant until the summer of 1936. In this, however, she apparently contradicted herself, as in another part of her examination she testified that appellee came to see her as soon as he received her letter and that in April, 1936, she also mentioned her condition to him.

Dr. David J. Kweder testified that he attended the prosecuting witness when the child was born on July 11, 1936, that the baby was prematurely born, was not a full period child and not normally developed. That the set period of gestation is two hundred eighty days, that a variation of ten days frequently occurs and that in his opinion this baby was, according to its weight and size, about six weeks premature. Upon cross examination the doctor testified that the only way to find out the date of conception was to inquire of the mother, that she told him that her conception took place around Thanksgiving and that he thought she told him her last menstrual period was the 28th of November, around Thanksgiving day, 1935.

It was stipulated that Helen Andrzejewski was a sister of the prosecuting witness and that if present she would testify that she attended the party at the home of Mrs. Basowski and there saw the prosecuting witness and appellee in the room where they remained approximately one-half hour and that when the prosecuting witness came out of the room, the sister noticed white spots on her dress.

Appellee did not testify nor did he offer any evidence in his own behalf. His counsel insist, however, that the testimony of the prosecuting witness is inherently improbable and so illogical, unbelievable and unworthy of credence that the jury was warranted in returning the verdict it did. Counsel call our attention to the fact that the alleged sexual intercourse took place at a party where there were many people but no one other than the sister of the prosecuting witness was called to corroborate her story,

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that the prosecuting witness knew of her condition in December, 1935, that she testified she had intercourse with appellee in February and March, 1936 but did not speak to him of her pregnancy until almost six months after she conceived, that she must be a person of loose morals because she admitted she had had sexual intercourse with some one else when she was only fifteen years of age.

This is a civil proceeding to recover a sum of money, not exceeding the amount prescribed by the statute, for the support of a child, to which its father owes the duty of maintenance. The People v. Humbracht, 215 Ill. App. 29. Under our system of jurisprudence, the jury were the judges of the facts in this case, but the verdict which the jury was obligated to return must be based upon the evidence submitted to them. Where the testimony of witnesses is not opposed to probabilities, stands uncontradicted, either by other testimony or by circumstances, either intrinsic or extrinsic, and the witnesses are not impeached, such testimony should not be rejected by court or jury. Larson v. Glos, 235 Ill. 584. In the instant case the prosecuting witness was a girl nineteen years of age, her relations with appellee were quite clearly stated. She detailed some conversations with appellee in which she said he promised to aid and assist her in the support and maintenance of the child. From reading this record we are unable to say that there is such inherent improbability in her testimony as would warrant the jury in disregarding it. Her evidence is not so incredible as to induce us to say that it is beyond the limits of human belief. All the testimony in the record is undenied and not disputed and while it is true that a court or jury is not bound to believe a witness when, from its inherent improbability or contradictions the court or jury is satisfied of its falsity, still neither a court or jury can wilfully or from

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mere caprice disregard the testimony of an unimpeached witness.
Podolski v. Stone, 186 Ill. 540; Chicago and Alton R. R. Co. v.
Gretzner, 26 Ill. 74.

For the error of the trial court in overruling appellant's
motion for a new trial, the judgment is reversed and the cause
remanded.

REVERSED AND REMANDED.

that the prosecuting witness knew of her condition in December, 1935, that she testified she had intercourse with appellee in February and March, 1936 but did not speak to him of her pregnancy until almost six months after she conceived, that she must be a person of loose morals because she admitted she had had sexual intercourse with some one else when she was only fifteen years of age. This is a civil proceeding to recover a sum of money, not exceeding the amount prescribed by the statute, for the support of a child, to which the father owes the duty of maintenance. The People v. Humphreys, 215 Ill. App. 2d. Under our system of jurisprudence, the jury were the judges of the facts in this case, but the verdict which the jury was obligated to return must be based upon the evidence submitted to them. Where the testimony of witnesses is not opposed to probabilities, stands uncontradicted, either by other testimony or by circumstances, either intrinsic or extrinsic, and the witnesses are not impeached, such testimony should not be rejected by court or jury. Larson v. Olson, 230 Ill. 584. In the instant case the prosecuting witness was a girl nineteen years of age, her relations with appellee were quite clearly stated. She detailed some conversations with appellee in which she said he promised to aid and assist her in the support and maintenance of the child. From reading this record we are unable to say that there is such inherent improbability in her testimony as would warrant the jury in disregarding it. Her evidence is not so incredible as to induce us to say that it is beyond the limits of human belief. All the testimony in the record is uncontradicted and not disputed and while it is true that a court or jury is not bound to believe a witness when, from the inherent improbability or contradictions the court or jury is satisfied of its falsity, still neither a court or jury can willfully or from

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Gratner, 45 Ill. 71.

For the error of the trial court in overruling appellant's

motion for a new trial, the judgment is reversed and the cause

remanded.

REVEREND AND REMIND.

STATE OF ILLINOIS, } ss.

SECOND DISTRICT

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



9224

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 619³

BE IT REMEMBERED, that afterwards, to-wit: On JUN 30 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

THE UNIVERSITY OF CHICAGO
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IN THE
APPELLATE COURT OF ILLINOIS
Second District

May Term, A. D. 1937

JESSIE A. GARDNER, CAROLINE)
BOWDEN, FLORENCE RUNYARD,)
BESSIE JAMES and MABEL McDONALD,)
Appellants,)
vs.)
JAMES T. WOLFE and STRAUS)
SECURITIES CORPORATION, a Corp.,)
Appellees.)

APPEAL FROM THE CIRCUIT
COURT OF WINNEBAGO COUNTY.

DOVE, J.

This suit was instituted by the plaintiffs to recover damages for injuries sustained by them in an automobile collision. At the conclusion of the evidence offered on their behalf, the jury, in obedience to a peremptory instruction, returned a verdict finding the defendants not guilty. Upon this verdict judgment was rendered and the record is in this court for review.

The complaint consists of five counts, one for each of the plaintiffs named. The first count alleges that on July 19, 1935, the defendant James T. Wolfe was employed as a salesman by the defendant Straus Securities Corporation and in the course of his employment was operating an automobile on the business of his employer, driving in a westerly direction on U. S. Highway No. 20,

IN THE
APPELLATE COURT OF ILLINOIS
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COURT OF CHICAGO COUNTY.

Appellants,
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BOWDEN, FLORENCE RUMYARD,
JESSIE JAMES and MARIE McDONALD,
vs.
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SECURITIES CORPORATION, a Corp.,
Appellees.

DOVE, J.

This suit was instituted by the plaintiffs to recover damages for injuries sustained by them in an automobile collision. At the conclusion of the evidence offered on their behalf, the jury, in obedience to a peremptory instruction, returned a verdict finding the defendants not guilty. Upon this verdict judgment was rendered and the record is in this court for review. The complaint consists of five counts, one for each of the plaintiffs named. The first count alleges that on July 19, 1935, the defendant James T. Wolfe was employed as a salesman by the defendant Straus Securities Corporation and in the course of his employment was operating an automobile on the business of his employer, driving in a westerly direction on U. S. Highway No. 30,

running between Rockford, Illinois, and Freeport, Illinois, that the plaintiff, Jessie A. Gardner, was the owner of and operated an automobile and was driving easterly upon said highway near a Sinclair Gasolene Station about five miles west of Rockford, that she was using due care and caution for her own safety and for her automobile and for the passengers therein and for others and their property who might lawfully and rightfully be upon said highway. This count then alleged that the defendant Wolfe so carelessly and negligently managed, operated and controlled his automobile at a high, excessive and unreasonable rate of speed, sixty-five to seventy miles per hour, that he lost control thereof and ran into and collided with the plaintiff's automobile, thereby causing damage to her automobile and injuries to her person. The second, third, fourth and fifth counts are substantially the same, except they relate to the plaintiffs Caroline Bowden, Florence Runyard, Bessie James and Mabel McDonald respectively and each count alleges that the respective plaintiffs were passengers in the automobile of the plaintiff Jessie A. Gardner at the time and place in question and that each plaintiff was in the exercise of due care for her own safety. Separate answers were filed by each defendant specifically denying the various allegations of the complaint and the defendant corporation specifically denied that Wolfe was employed by it as a salesman, denied that he was operating the automobile in question in the course of his employment and denied that he was on the business of the corporation at the time of the accident.

The evidence submitted on behalf of the plaintiffs is to the effect that the plaintiffs all live west of Rockford in the Village of Winnebago, Illinois, and were members or attendants

running between Rockford, Illinois, and Freeport, Illinois, that the plaintiff, Jessie A. Gardner, was the owner of and operated an automobile and was driving westerly upon said highway near a Sinclair Gasoline Station about five miles west of Rockford, that she was using due care and caution for her own safety and for her automobile and for the passengers therein and for others and their property who might lawfully and rightfully be upon said highway. This count then alleged that the defendant drove so carelessly and negligently in driving, operated and controlled his automobile at a high, excessive and unreasonable rate of speed, sixty-five to seventy miles per hour, that he lost control thereof and ran into and collided with the plaintiff's automobile, thereby causing damage to her automobile and injuries to her person. The second, third, fourth and fifth counts are substantially the same, except they relate to the plaintiff's Caroline Bowden, Florence Runyard, Jessie James and Mabel McDonald respectively and each count alleges that the respective plaintiffs were passengers in the automobile of the plaintiff Jessie A. Gardner at the time and place in question and that each plaintiff was in the exercise of due care for her own safety. Separate answers were filed by each defendant specifically denying the various allegations of the complaint and the defendant corporation specifically denied that it was employed by it as a sales man, denied that he was operating the automobile in question in the course of his employment and denied that he was on the business of the corporation at the time of the accident. The evidence submitted on behalf of the plaintiffs is to the effect that the plaintiffs all live west of Rockford in the Village of Winnebago, Illinois, and were members or attendants

of the Methodist Church there; that prior to July 19, 1935, Mrs. Gardner had invited the other plaintiffs to accompany her in her car to attend "Ladies Day" at Camp Epworth, a Methodist Camp ground located east of Belvidere. It was arranged that each lady would take some food and when they arrived at the camp they would have a picnic lunch together. About nine thirty o'clock on the morning of July 19, 1935, Mrs. Gardner, driving her Buick sedan, called for the other ladies. Mrs. McDonald rode in the front seat with Mrs. Gardner and the three other plaintiffs in the rear seat. They proceeded easterly along U. S. Highway No. 20, a cement pavement eighteen feet wide, having a black line down the center and had reached a point about five miles west of Rockford. There was a gasoline station located on the north side of the highway and Mrs. Gardner, the driver of the car, stated that she intended to get some gas. One of the ladies heard her make this statement, the others did not. She had been driving between thirty and thirty-five miles per hour and slowed up, as she started to cross the pavement and go into the station, to about twenty miles per hour, and as she crossed the black line reduced the speed of her car to about fifteen miles per hour and made a gradual diagonal left turn into the north traffic lane in order to reach the gasoline station on that side of the highway. Mrs. Gardner testified that just before she started to turn her car diagonally across the slab, she looked ahead to the east and could see the highway for a distance of approximately five hundred feet to a point where the road curved, that there was some shrubbery on the south side of the highway near the curve which prevented her from seeing around the curve, that there was no car in sight coming toward her from the east and she observed that no car was approaching from the west. She further testified that as she turned out

of the Methodist Church there; that prior to July 19, 1935, Mrs. Gardner had invited the other plaintiffs to accompany her in her car to attend "Ladies Day" at Camp Howarth, a Methodist Camp ground located east of Leivikere. It was arranged that each lady would take some food and when they arrived at the camp they would have a picnic lunch together. About nine thirty o'clock on the morning of July 19, 1935, Mrs. Gardner, driving her Buick sedan, called for the other ladies. Mrs. McDonald rode in the front seat with Mrs. Gardner and the three other plaintiffs in the rear seat. They proceeded easterly along U. S. Highway No. 20, a cement pavement eighteen feet wide, having a black line down the center and had reached a point about five miles west of Rockford. There was a gasoline station located on the north side of the highway and Mrs. Gardner, the driver of the car, stated that she intended to get some gas. One of the ladies heard her make this statement, the others did not. She had been driving between thirty and thirty-five miles per hour and slowed up, as she started to cross the pavement and go into the station, to about twenty miles per hour, and as she crossed the black line reduced the speed of her car to about fifteen miles per hour and made a gradual diagonal left turn into the north traffic lane in order to reach the gasoline station on that side of the highway. Mrs. Gardner testified that just before she started to turn her car diagonally across the road, she looked ahead to the east and could see the highway for a distance of approximately five hundred feet to a point where the road curved, that there was some shrubbery on the south side of the highway near the curve which prevented her from seeing around the curve, that there was no car in sight coming toward her from the east and she observed that no car was approaching from the west. She further testified that as she turned out

of her own traffic lane, she looked toward the oil station into which she intended to drive, that when her car was halfway across the north traffic lane, she again looked east and for the first time observed the Chrysler car which the defendant Wolfe was driving. Mrs. Gardner testified she was a widow, fifty-six years of age, and had been driving automobiles for sixteen years, that her eyesight was good and in her opinion, as she glanced at the Wolfe car, it was about one hundred forty feet east of her and travelling at the rate of sixty-five to seventy miles per hour. The testimony of this and other witnesses was to the effect that the driver of the Wolfe car gave no signal as he approached and did not reduce the speed of his car as he proceeded along the highway and that the Wolfe car came into collision with the Gardner car when the front half of the Gardner car had passed off of the north edge of the pavement and while the front wheels of that car were upon the driveway of the filling station. Miss James testified that when she first observed the Wolfe car, it was about one hundred feet east of her and at that time the Gardner car was half way across the north traffic lane and that when the collision occurred all four wheels and practically all of the Gardner car were off the pavement on the north side and the Wolfe car was entirely off the pavement before the time of the accident. The evidence of some of the other witnesses was that at the time of the collision the right wheels of the Wolfe car were north of the north edge of the pavement and it was the opinion of Mrs. Gardner that Wolfe was attempting to go around the front of her car to the north. A photograph taken shortly after the collision and before the cars had been moved was admitted in evidence, which shows the position and condition of the cars when they came to rest, and this photograph, taken in

of her own traffic lane, and looked toward the oil station into which she intended to drive, that her car was halfway across the north traffic lane, and again looked east and for the first time observed the Chrysler car which the defendant Wolfe was driving. Mrs. Gardner testified she was a widow, fifty-six years of age, and had been driving automobiles for sixteen years, that her eyesight was good and in her opinion, as she glanced at the Wolfe car, it was about one hundred forty feet east of her and travelling at the rate of sixty-five to seventy miles per hour. The testimony of this and other witnesses was to the effect that the driver of the Wolfe car gave no signal as he approached and did not reduce the speed of his car as he proceeded along the highway and that the Wolfe car came into collision with the Gardner car when the front half of the Gardner car had passed off of the north edge of the pavement and while the front wheels of that car were upon the driveway of the filling station. Mrs. James testified that when she first observed the Wolfe car, it was about one hundred feet east of her and at that time the Gardner car was half way across the north traffic lane and that when the collision occurred all four wheels and practically all of the Gardner car were off the pavement on the north side and the Wolfe car was entirely off the pavement before the time of the accident. The evidence of some of the other witnesses was that at the time of the collision the right wheels of the Wolfe car were north of the north edge of the pavement and it was the opinion of Mrs. Gardner that Wolfe was attempting to go around the front of her car to the north. A photograph taken shortly after the collision and before the cars had been moved was admitted in evidence, which shows the position and condition of the cars when they came to rest, and this photograph, taken in

connection with some of the other evidence in the record, tends to prove that at this time the Gardner car was entirely off of the pavement except the right rear wheel and all the Wolfe car was off the pavement except the left rear wheel, the right wheel being near the north edge of the pavement. The evidence further tends to prove that the front end of the Wolfe car came in contact with the right front wheel, right running board, fender and right front door of the Gardner car and as a result of the collision the Gardner car was forced four to six feet north and west and came to rest against another car parked at the filling station and the front end and radiator of the Wolfe car, when it came to rest, was against the Gardner car. The pavement was level and there were no cars or vehicles of any kind other than the Wolfe car coming from the east between the Gardner car and the curve in the highway and no traffic coming from the west. The evidence is further that some of the ladies were talking just before the collision and all of them did not hear Mrs. Gardner say anything about getting gas and those on the rear seat did not know she intended to cross over to the filling station until they felt the movement of the car. All of the occupants of the Gardner car sustained injuries, but those suffered by Miss James and Mrs. McDonald were not very serious.

The plaintiffs called the defendant Wolfe as their witness and he testified that he owned the Chrysler automobile which he was driving the morning in question and at that time was a licenced securities salesman having an office in the Manufacturers National Bank Building in Rockford, that he was then and had been for some time engaged in selling securities for Straus Securities Corporation. That upon the morning of the accident he was going to Freeport to call on customers of the Straus Corporation, that the

connection with some of the other evidence in the record, tends to prove that at this time the Gardner car was actually off of the pavement except the right rear wheel and all the Wolf car was off the pavement except the left rear wheel, the right wheel being near the north edge of the pavement. The evidence further tends to prove that the front end of the Wolf car came in contact with the right front wheel, right running board, fender and right front door of the Gardner car and as a result of the collision the Gardner car was forced down to six feet north and west and came to rest against another car parked at the filling station and the front end and radiator of the Wolf car, when it came to rest, was against the Gardner car. The pavement was level and there were no cars or vehicles of any kind other than the Wolf car coming from the east between the Gardner car and the curve in the highway and no traffic coming from the west. The evidence is further that some of the ladies were talking just before the collision and all of them did not hear that Gardner say anything about getting gas and those on the rear seat did not know she intended to cross over to the filling station until they felt the movement of the car. All of the occupants of the Gardner car sustained injuries, but those suffered by Miss Jones and Mr. McDonald were not very serious.

The plaintiff called the defendant Wolfe as their witness and he testified that he owned the Chevrolet automobile which he was driving the evening in question and at that time was a licensed securities salesman having an office in the Bondholders National Bank Building in Boston, that he was then and had been for some time engaged in selling securities for Strada Securities Corporation. That upon the morning of the accident he was going to report to call on customers of the Strada Corporation, that the

president of the company directs his work and assigned to him his territory, issued to him his orders and had the power to discharge him or terminate his work. That he had a drawing account with the Securities Corporation and was paid by it for the services he rendered in selling securities, that he received a commission on sales made and that his rate of pay depended upon his earnings.

In granting the motion of the defendants, the trial court held that the occupants of the Gardner car were engaged in a common enterprise and that all of them were guilty of contributory negligence, which precluded a recovery, and counsel for appellees argue that the evidence discloses that when the driver of the Gardner car started to cross the highway into the filling station, she saw the Wolfe car coming and that it was then within one hundred and forty feet and travelling toward her at a speed between sixty-five and seventy miles per hour and that the only conclusion that can be drawn therefrom is that Mrs. Gardner suddenly turned her car right into the path of the oncoming Wolfe car. In our opinion a fair construction of Mrs. Gardner's testimony is that just before she started to cross over to the filling station she looked toward the east and could see approximately five hundred feet to the curve, that there was no car in view, that she then looked toward the filling station and turned her car in that direction and had proceeded across the black line and into the north traffic lane when she again looked to the east and for the first time saw the Wolfe car approaching and at that time it was approximately one hundred and forty feet distant. The evidence tends to prove that Mrs. Gardner did not turn her car suddenly at right angles into the path of the Chrysler car, but that she made a gradual, diagonal turn. The evidence further tends to prove that the Wolfe car was

President of the company directs his work and assigned to him his territory, issued to him his orders and had the power to discharge him or terminate his work. That he had a drawing account with the Securities Corporation and was paid by it for the services he rendered in selling securities, that he received a commission on sales made and that his rate of pay depended upon his earnings.

In granting the motion of the defendants, the trial court held that the occupants of the Gardner car were engaged in a common enterprise and that all of them were guilty of contributory negligence, which precluded a recovery, and counsel for appellees argue that the evidence discloses that when the driver of the Gardner car started to cross the railway into the filling station, she saw the Wolfe car coming and that it was then within one hundred and forty feet and travelling toward her at a speed between sixty-five and seventy miles per hour and that the only conclusion that can be drawn therefrom is that Mrs. Gardner suddenly turned her car right into the path of the oncoming Wolfe car. In our opinion a fair construction of Mrs. Gardner's testimony is that just before she started to cross over to the filling station she looked toward the east and could see approximately five hundred feet to the curve, that there was no car in view, that she then looked toward the filling station and turned her car in that direction and had proceeded across the block line and into the north traffic lane when she again looked to the east and for the first time saw the Wolfe car approaching and at that time it was approximately one hundred and forty feet distant. The evidence tends to prove that Mrs. Gardner did not turn her car suddenly at right angles into the path of the Chrysler car, but that she made a gradual, diagonal turn. The evidence further tends to prove that the Wolfe car was

proceeding at between sixty-five and seventy miles per hour, so that only five or six seconds must have elapsed from the time the Chrysler car came within the range of vision of those in the Gardner car and the time of the Collision.

On a motion for a directed verdict, the only question for the trial court was to determine whether or not there was in the record any evidence which with all reasonable inferences to be drawn therefrom proved or tended to prove the plaintiff's claim and if there was, the motion should have been overruled. Libby, McNeill and Libby v. Cook, 222 Ill. 206; Anderson v. Chesapeake and Ohio Ry. Co., 352 Ill. 561.

Whether the plaintiffs were in the exercise of ordinary care and whether the defendants were guilty of the negligence charged were questions of fact to be determined from all the facts and circumstances in evidence and where there is any evidence, with any legitimate inferences that may reasonably and legally be drawn therefrom, tending to show the exercise of due care on the part of the plaintiffs and the negligence of the defendants as charged, then the case should be permitted to go to the jury.

In the view we have taken of this record, it is unnecessary to pass upon the motions of appellants which were taken with the case. We have read the evidence in this record as abstracted by counsel for appellants and in the additional abstract furnished by counsel for appellees and in our opinion the evidence does not disclose that those who accompanied Mrs. Gardner had anything to do with her operation or control of the car, nor is there anything shown as to her manner of driving of the surrounding conditions of the traffic or highway which could have reasonably caused any of them to anticipate any danger until it was too late for them to have

proceeding at between sixty-five and seventy miles per hour, as
that only five or six seconds must have elapsed from the time
the Chrysler car came within the range of vision of those in the
other car and the time of the collision.
On a motion for a directed verdict, the only question
for the trial court was to determine whether or not there was in
the record any evidence which with all reasonable inferences to be
drawn therefrom proved or tended to prove the plaintiff's claim and
if there was, the motion should have been overruled. *Hibby*,
O'Neill and Hibby v. Cook, 222 Ill. 208; *Anderson v. Chesapeake*
and Ohio Ry. Co., 222 Ill. 281.
Whether the plaintiffs were in the exercise of ordinary
care and whether the defendants were guilty of the negligence
charged were questions of fact to be determined from all the
facts and circumstances in evidence and where there is any evidence,
with any legitimate inferences that may reasonably and legally
be drawn therefrom, tending to show the exercise of due care on
the part of the plaintiffs and the negligence of the defendants as
charged, then the case should be permitted to go to the jury.
In the view we have taken of this record, it is unnecessary
to pass upon the motions of appellants which were taken with
this case. We have read the evidence in this record as abstracted
by counsel for appellants and in the additional abstract furnished
by counsel for appellees and in our opinion the evidence does not
disclose that those who accompanied Mrs. Gardner had anything
to do with her operation or control of the car, nor is there anything
shown as to her manner of driving or the surrounding conditions or
the traffic on highway which could have reasonably caused any of
them to anticipate any danger until it was too late for them to have

warned the driver. The evidence submitted on behalf of the plaintiffs tended to prove the allegations of the complaint to the effect that Mrs. Bowden, Mrs. Runyard, Miss James and Mrs. McDonald were guest passengers of Mrs. Gardner and tended to prove the averments of the complaint as to due care and the charge of negligence contained therein. It was therefore error for the trial court to direct a verdict at the close of the plaintiff's evidence and for that error the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

turned the driver. The evidence submitted on behalf of the plain-

iffs tended to prove the allegations of the complaint to the effect that Mrs. Howard, Mrs. Howard, Miss James and Mrs. McDonald

were guest passengers of Mrs. Gordon and tested to prove the verities of the complaint as to due care and the charge of negli-

gence contained therein. It was therefore error for the trial court to direct a verdict at the close of the plaintiff's evidence

and for that error the judgment must be reversed and the case

remanded.

REVEREND THE HONORABLE

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



9229

AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois;

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 619⁴

BE IT REMEMBERED, that afterwards, to-wit: On JUN 30 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1937

C. W. TURNER,)	
)	
Appellant,)	
	)	APPEAL FROM THE COUNTY
v.)	
	)	COURT OF KANKAKEE COUNTY.
ELVIRA ESSINGTON,)	
)	
Appellee,)	

DOVE, J.

On April 15, 1935, a judgment by confession was rendered by the County Court of Kankakee County in favor of the plaintiff and against the defendant for \$990.00 upon a note for the principal sum of \$838.50, dated August 26, 1932, and bearing 6% interest from date until paid. This judgment was on December 2, 1936, amended and the amount thereof reduced to \$894.80. Upon motion of the defendant, the judgment was opened up and leave granted the defendant to answer. After the issues were made up, the cause was submitted to a jury, resulting in a verdict finding the issues for the plaintiff and assessing his damages at \$150.00. Upon this verdict, the trial court entered an order on January 29, 1937, reducing the judgment theretofore rendered on April 15, 1935, to \$150.00 and directing that it stand in full force for that amount. From that judgment the record is brought to this court for review by the plaintiff below.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1937

COURT OF KANE COUNTY.
APPEAL FROM THE COUNTY

Appellate,
v.
ELVIN A. ELLINGTON,
Appellee.

DOVE, J.

On April 15, 1983, judgment by confession was rendered

by the plaintiff below.

From that judgment the record is brought to this court for review \$150.00 and directing that it stand in full force for that amount. reducing the judgment theretofore rendered on April 15, 1935, to verdict, the trial court entered an order on January 29, 1937, the plaintiff and assessing his damages at \$150.00. Upon this submitted to a jury, resulting in a verdict finding the assets for defendant to answer. After the issues were made up, the cause was defendant, the judgment was opened up and leave granted the and the amount thereof reduced to \$94.80. Upon motion of the date until paid. This judgment was on December 2, 1936, amended sum of \$55.50, dated August 28, 1932, and bearing 6% interest from and against the defendant for \$90.00 upon a note for the principal by the County Court of Kanawhee County in favor of the plaintiff

The evidence discloses that on August 15, 1931, the husband of appellee, Willard Essington, borrowed from appellant \$200.00 and, as evidence of that indebtedness, appellee and her husband executed and delivered to appellant a note for that amount. On October 21, 1931, the husband of appellee, Willard Essington, executed his note to appellant for the sum of \$3800.00, due in one year after date and secured the payment thereof by a chattel mortgage upon practically all of his personal property. On November 2, 1931, appellee and her husband, Willard Essington, executed their note and delivered the same to appellant for \$553.50 due one year after date. On February 24, 1932, appellant loaned Willard Essington the further sum of \$55.00 and on that day appellee and her husband executed a note for that amount payable to the order of appellant twelve months after date. In March, 1932, Willard Essington was adjudged a voluntary bankrupt. Appellant filed his claim in the bankruptcy court, basing the same upon these three notes executed by appellant and her husband and his claim was allowed as an unsecured claim. Thereafter the note which forms the basis of this action was executed by appellee and delivered to appellant. Subsequently appellant received as a dividend from the trustee in bankruptcy the sum of \$113.20 and a further sum of \$29.00, which sums were applied upon the judgment and the original judgment reduced by the order of December 2, 1936.

It is contended by appellant that the note sued on represents the amount due him on August 26, 1932 upon the note of August 15, 1931, for \$200.00, upon the note of November 2, 1931, for \$553.50 and upon the note of February 26, 1932, for \$55.00, the principal sums of which aggregate \$808.50. That appellee had

The evidence discloses that on August 15, 1931, the husband of appellee, Willard Eastington, borrowed from appellant \$200.00 and, as evidence of that indebtedness, appellee and her husband executed and delivered to appellant a note for that amount. On October 21, 1931, the husband of appellee, Willard Eastington, executed his note to appellant for the sum of \$300.00, due in one year after date and secured the payment thereof by a chattel mortgage upon practically all of his personal property. On November 3, 1931, appellee and her husband, Willard Eastington, executed their note and delivered the same to appellant for \$253.50 due one year after date. On February 24, 1932, appellant loaned Willard Eastington the further sum of \$50.00 and on that day appellee and her husband executed a note for that amount payable to the order of appellant twelve months after date. In March, 1932, Willard Eastington was adjudged a voluntary bankrupt. Appellant filed his claim in the bankruptcy court, bearing the same upon these three notes executed by appellant and her husband and his claim was allowed as an unsecured claim. Thereafter the note which forms the basis of this action was executed by appellee and delivered to appellant. Subsequently appellant received as a dividend from the trustee in bankruptcy the sum of \$113.30 and a further sum of \$29.00, which sums were applied upon the judgment and the original judgment reduced by the order of December 2, 1932. It is contended by appellant that the note sued on represents the amount due him on August 26, 1932 upon the note of August 15, 1931, for \$200.00, upon the note of November 3, 1931, for \$253.50 and upon the note of February 24, 1932, for \$50.00, the principal sums of which aggregate \$503.50. That appellee had

executed these three notes with her husband and in executing the note sued on discharged her liability upon these former obligations. It is further insisted by counsel for appellant that there is no basis in the record for the verdict or judgment of \$150.00 and that the trial court erred in refusing to direct a verdict in favor of appellant at the close of all the evidence.

Counsel for appellee insist that on October 21, 1931, when the note of \$3800.00, signed by Willard Essington and secured by a chattel mortggge upon Willard's personal property was executed, the only consideration therefor was appellant's promise to make future advancements to Willard Essington, that the payment to Willard by appellant of the sum of \$553.00 on November 2, 1931, and the payment to him of \$55.00 on February 26, 1932, were such advancements and as the amounts due on these notes were included in the principal of the note sued on, there was, therefore, no consideration for the execution by appellee of the note which forms the basis of this action, except the cancellation of her note of August 15, 1931, for \$200.00. In accounting for the verdict of \$150.00, counsel for appellee state that it is apparent that the jury found appellee liable for the sum of \$200.00 borrowed from appellant on August 15, 1931, and for \$55.00 borrowed from appellant on February 24, 1932. That these two amounts aggregate \$255.00. That appellant received from the trustee in bankruptcy of Willard's estate the sum of \$113.20 and the further sum of \$29.00. Deducting these credits from the \$255.00 leaves 112.80 to which interest to the date of the judgment, amounting to \$24.50, should be added, making a total of \$137.30 and computing interest on this sum from the date of the judgment to the date of

executed these three notes with her husband and in executing the note sued on discharged her liability upon these former obligations. It is further insisted by counsel for appellant that there is no basis in the record for the verdict or judgment of \$50.00 and that the trial court erred in refusing to direct a verdict in favor of appellant at the close of all the evidence.

Counsel for appellee insists that on October 21, 1931, when the note of \$300.00, signed by Willard Washington and secured by a chattel mortgage upon Willard's personal property was executed, the only consideration therefor was appellant's promise to make future advancements to Willard Washington, that the payment to Willard by appellant of the sum of \$325.00 on November 2, 1931, and the payment to him of \$25.00 on February 26, 1932, were such advancements and as the amounts due on these notes were included in the principal of the note sued on, there was, therefore, no consideration for the execution by appellee of the note which forms the basis of this action, except the cancellation of her note of August 15, 1931, for \$300.00. In accounting for the verdict of \$50.00, counsel for appellee states that it is apparent that the jury found appellee liable for the sum of \$100.00 borrowed from appellant on August 15, 1931, and for \$25.00 borrowed from appellant on February 26, 1932. That these two amounts aggregate \$125.00. That appellant received from the trustee in bankruptcy of Willard's estate the sum of \$118.30 and the further sum of \$29.00. Deducting these credits from the \$154.30 leaves \$125.30 to which interest to the date of the judgment, amounting to \$4.50, should be added, making a total of \$129.80 and computing interest on this sum from the date of the judgment to the date of

the trial would bring the amount due appellant to \$148.72. It is also insisted by appellee that if the testimony of appellant is to be relied upon, then the chattel mortgage executed by her husband on October 21, 1931, was accepted by appellant for the purpose of perpetrating a fraud on Willard Essington's creditors and that the note involved herein was a part of that fraudulent transaction and appellant should not be afforded any relief by the courts.

It is clear from all the testimony in this record that the purpose of Willard Essington and appellant was to place an ostensible encumbrance upon Willard's personal property. It is equally clear that at the time of the execution of the \$5800.00 note and the chattel mortgage that no consideration passed from the mortgagee to the mortgagor and it was not considered an obligation by either of them. It is also clear that appellant didn't intend to advance Willard any money, relying upon the chattel mortgage, because after its execution he furnished him \$553.50 on one occasion and \$55.00 on another but each time he required a note signed by appellee. Appellee testified that she signed these two notes and also the previous one for \$200.00 because appellant would not furnish her husband any money unless she signed the notes. "I understood", she said, "that Willard wouldn't get the money unless I signed the three notes, that was the reason I signed them. Every time he (appellant) gave him (Appellee's husband) money, when he signed the note, I had to sign, too: I understood that."

By her answer, appellee alleged that the only consideration for the note sued on was her past due note of \$200.00 and insisted

the trial would bring the amount an appellant to \$48.72. It is also insisted by appellee that if the testimony of appellant is to be relied upon, then the chattel mortgage executed by her husband on October 21, 1931, was executed by appellant for the purpose of perpetrating a fraud on William Washington's creditors and that the note involved herein was a part of that fraudulent transaction and appellant should not be afforded any relief by the courts.

It is clear from all the testimony in this record that the purpose of William Washington and appellant was to place an ostensible encumbrance upon William's personal property. It is equally clear that at the time of the execution of the \$200.00 note and the chattel mortgage that no consideration passed from the mortgagee to the mortgagor and it was not considered an obligation by either of them. It is also clear that appellant didn't intend to advance William any money, relying upon the chattel mortgage, because after its execution he furnished him \$22.50 on one occasion and \$25.00 on another but each time he required a note signed by appellee. Appellee testified that she signed these two notes and also the previous one for \$100.00 because appellant would not furnish her husband any money unless she signed the notes. "I understood," she said, "that William wouldn't get the money unless I signed the three notes, that was the reason I signed them. Every time he (appellant) gave him (Appellee's husband) money, when he signed the note, I had to sign, too; I understood that."

In her answer, appellee alleged that the said consideration for the note was her past due note of \$100.00 and insisted

that appellant should only have a judgment for the amount due on that note, less the dividend which he had received from the trustee in bankruptcy. She also alleged in her answer that at the time the note sued on was executed, she was pregnant and because thereof she was nervous and under a mental and physical strain, that appellant threatened to withdraw his claim against her husband in the bankruptcy proceedings if she did not sign the note sued on and that he stated if she would sign it he would never use the note against her and that as a result of her condition and his statements, she finally signed the note. We have read the record, but there is no evidence that appellee was acting under duress when she executed the note sued on. She filled in the written portions of the note herself. Her husband was present and he did not testify to any undue influence and her sister, who was also present, said she willingly signed the note and the only statement she testifies to that appellant made was that if she did not sign the note he would withdraw his claim in the bankruptcy court. This was not a threat. At the most it was a statement that he would do something which he had a perfect right to do.

Neither is there any merit in appellee's contention that appellant cannot recover because he accepted a chattel mortgage from appellee's husband which she insists is fraudulent. The note which forms the basis of this suit was executed by appellee on August 26, 1932. The chattel mortgage which appellee insists should estop appellant from a recovery herein was executed by the husband of appellee the previous October. The note involved herein was not connected in any way with the chattel mortgage transaction.

that appellant should only have a judgment for the amount due on that note, less the dividend which he had received from the trustee in bankruptcy. She also alleged in her answer that at the time the note sued on was executed, she was present and because thereof she was nervous and under a mental and physical strain, that appellant threatened to withdraw his claim against her husband in the bankruptcy proceedings if she did not sign the note sued on and that he stated if she would sign it he would never use the note against her and that as a result of her condition and his statements, she finally signed the note. We have read the record, but there is no evidence that appellee was acting under duress when she executed the note sued on. She filed in the written portions of the note herself. Her husband was present and he did not testify to any undue influence and her sister, who was also present, said she willingly signed the note and the only statement she testified to that appellant made was that if she did not sign the note he would withdraw his claim in the bankruptcy court. This was not a threat. At the most it was a statement that he would do some thing which he had a perfect right to do.

Neither is there any merit in appellee's contention that appellant cannot recover because he accepted a chattel mortgage from appellee's husband which she insists is fraudulent. The note which forms the basis of this suit was executed by appellee on August 20, 1932. The chattel mortgage which appellee insists should stop appellant from a recovery herein was executed by the husband of appellee the previous October. The note involved herein was not connected in any way with the chattel mortgage transaction.

In accounting for the amount of the verdict of the jury, counsel for appellee state that the jury must have taken into consideration the \$200.00 evidenced by the note of August 15, 1931, and also the \$55.00 evidenced by the note of February 26, 1932. If they were justified in including in their verdict the sum of \$55.00, as evidenced by the note of February 26, 1932, the sum of \$553.50 as evidenced by the note of November 2, 1931, should likewise have been included^{ed}. The verdict, in our opinion, is not sustained by the evidence and is manifestly not supported by the testimony found in this record.

It is undisputed that appellant loaned appellee's husband the several amounts of money as evidenced by the several notes to which we have referred. That appellee executed those notes, intending to be bound thereby. That after her husband became a bankrupt, she recognized her liability to appellant and wrote him to the effect that she hoped he would get his percent along with the rest of the creditors of her husband, as it would help her to that extent. It further appears that she intentionally and willingly executed the note sued on and that the consideration therefor was a valuable one and she either owes appellant the amount of the original judgment as amended or nothing at all. Her counsel concede she is indebted to appellant to the extent of \$148.72. In our opinion the defense interposed by appellee is not sustained by the evidence and the trial court erred in not instructing the jury at the close of all the evidence to return a verdict finding the issues for appellant.

The order appealed from is reversed and the cause remanded to the County Court of Kankakee County, with directions to that court to enter an order vacating the order opening up the judgment

In accounting for the amount of the verdict of the jury, counsel for appellee state that the jury must have taken into consideration the \$200.00 evidenced by the note of August 12, 1931, and also the \$50.00 evidenced by the note of February 26, 1932. If they were justified in including in their verdict the sum of \$50.00, as evidenced by the note of February 26, 1932, the sum of \$25.50 as evidenced by the note of November 2, 1931, should likewise have been included. The verdict, in our opinion, is not sustained by the evidence and is manifestly not supported by the testimony found in this record.

It is undisputed that appellant loaned appellee's husband the several amounts of money as evidenced by the several notes to which we have referred. That appellee executed those notes, intending to be bound thereby. That after her husband became a bankrupt, she recognized her liability to appellant and wrote him to the effect that she hoped he would get his present along with the rest of the creditors of her husband, as it would help her to that extent. It further appears that she intentionally and willfully executed the note sued on and that the consideration therefor was a valuable one and she either owes appellant the amount of the original judgment as amended or nothing at all. Her counsel conceded she is indebted to appellant to the extent of \$143.72. In our opinion the defense interposed by appellee is not sustained by the evidence and the trial court erred in not instructing the jury at the close of all the evidence to return a verdict finding the issues for appellant.

The order appealed from is reversed and the cause remanded to the County Court of Lawrence County, with directions to that court to enter an order vacating the order opening up the judgment

-7-

rendered on April 15, 1935, and directing that the judgment rendered on that day as amended by the order of December 2, 1936, stand in full force and effect.

REVERSED AND REMANDED WITH DIRECTIONS.

rendered on April 12, 1935, and directing that the judgment rendered on that day be amended by the order of December 2, 1935, stand in full force and effect.

LEWIS AND CLARK: THE DISCOVERY.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9186

AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 620

BE IT REMEMBERED, that afterwards, to-wit: On JUN 30 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1937

LONA HODGETT,)	
Plaintiff-Appellee)	
vs.	)	Appeal from the
	)	Circuit Court of
Fremont Bates,	)	Henry County
Defendant-Appellant)	

Wolfe,--J.

Lona Hodgett, the plaintiff, filed suit in the Circuit Court of Henry County, asking for actual and punitive damages against Fremont Bates, the defendant, because of an assault and battery committed by him upon the plaintiff. The complaint consists of two counts,- in the ordinary form,- and charges that the defendant unlawfully assaulted and violently siezed, beat, bruised, wounded and ill-treated the plaintiff, whereby she was greatly hurt, bruised and wounded, and suffered great pain and was permanently injured. She claims damage of \$10,000.

The defendant filed his answer and denied every allegation of the complaint. Further answering he says, "That plaintiff at the same time and place mentioned in said complaint, violently siezed and struck this defendant causing this defendant then and there to defend himself against the plaintiff as he lawfully might do, and in so doing, this defendant committed the so-called trespasses

IN THE
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1937

Appeal from the
Circuit Court of
Henry County

IONA HODGETT,
Plaintiff-Appellee
vs.
Tremont Bates,
Defendant-Appellant

Wolfe,--J.

Iona Hodgett, the plaintiff, filed suit in the Circuit Court of Henry County, asking for actual and punitive damages against Tremont Bates, the defendant, because of an assault and battery committed by him upon the plaintiff. The complaint consists of two counts, - in the ordinary form, - and charges that the defendant unlawfully assaulted and violently seized, beat, bruised, wounded and ill-treated the plaintiff, thereby she was greatly hurt, bruised and wounded, and suffered great pain and was permanently injured. The claims damage of \$10,000. The defendant filed his answer and denied every allegation of the complaint. Further answering he says, "That plaintiff at the same time and place mentioned in said complaint, violently seized and struck this defendant causing this defendant then and there to defend himself against the plaintiff as he lawfully might do, and in so doing, this defendant committed the so-called trespass

mentioned in said complaint." Further, he says, "If any hurt or damage then and there happened to plaintiff, the same was occasioned by the said assault so made by plaintiff upon him, the defendant, and in his necessary defense of himself against the plaintiff." The defendant further says, "that in so defending himself as aforesaid, he used no more force than was then and there necessary to save himself from great bodily harm and injury in the hands of said plaintiff."

The case was submitted to a jury which found the issues in favor of the defendant. The plaintiff entered a motion for a new trial. The trial court sustained a motion and set aside the verdict and granted a new trial. It is from this order of the trial court that this appeal in prosecuted. In the plaintiff's motion for a new trial, numerous reasons were assigned wherein the trial court erred, especially in the admission of evidence and in the giving of instructions on behalf of the defendant. It was further charged that the verdict of the jury was against the manifest weight of the evidence.

Instruction No. 18, offered and given in behalf of the defendant is as follows: "If the jury believe from the evidence that the plaintiff made the first assault upon the defendant, then, you are instructed that the defendant had a right to resist force by force and to use as much force as was reasonably necessary to defend himself; and in case the jury find from the evidence, that the plaintiff made the first assault upon the defendant, then to warrant a verdict for the plaintiff, the burden of proof is upon her to show that the defendant did use more force than was reasonably necessary under the circumstances to defend himself."

mentioned in said complaint." Further, he says, "If any hurt or damage then and there happened to plaintiff, the same was occasioned by the said assault so made by plaintiff upon him, the defendant, and in its necessary defense of himself against the plaintiff." The defendant further says, "that in so defending himself as aforesaid, he used no more force than was then and there necessary to save himself from great bodily harm and injury in the hands of said plaintiff."

The case was submitted to a jury which found the issues in favor of the defendant. The plaintiff entered a motion for a new trial. The trial court sustained a motion and set aside the verdict and granted a new trial. It is from this order of the trial court that this appeal is prosecuted. In the plaintiff's motion for a new trial, numerous reasons were assigned wherein the trial court erred, especially in the admission of evidence and in the giving of instructions on behalf of the defendant. It was further charged that the verdict of the jury was against the manifest weight of the evidence.

Instruction No. 18, offered and given in behalf of the defendant is as follows: "If the jury believe from the evidence that the plaintiff made the first assault upon the defendant, then, you are instructed that the defendant had a right to resist force by force and to use as much force as was reasonably necessary to defend himself; and in case the jury find from the evidence, that the plaintiff made the first assault upon the defendant, then to warrant a verdict for the plaintiff, the burden of proof is upon her to show that the defendant did use more force than was reasonably necessary under the circumstances to defend himself."

It will be observed that this instruction places the burden upon the plaintiff to show that the defendant did use more force than was reasonably necessary under the circumstances to defend himself. The defendant, by his answer, put in issue the question whether he used more force than was reasonably necessary to defend himself, and the burden was upon the defendant to prove that he did not use more force than was reasonably necessary to defend himself.-- *Gizler vs. Witzel*, 82-Ill.-323;. *Hale vs. Harmes*, 257-Ill.-App.,-388.

The record does not contain a statement of the trial court relative to the motion for the new trial or his reasons for granting the same. If the record in such cases, contains the trial court's reasons for granting the new trial, it greatly aids the reviewing court in passing on such motions.

The giving of instruction No. 18 was erroneous. The trial court might well have granted a new trial on this instruction alone. The matter of granting or denying a motion for new trial is largely discretionary with the trial court. Unless it clearly appears from the record that that discretion has been abused, a court of review would not be justified in overruling the decision of the trial court. We find nothing in this case that indicates to us that the trial court has abused his discretion. Therefore, the judgment of the trial court will be affirmed.

Affirmed.

It will be observed that this instruction places the burden upon the plaintiff to show that the defendant did use more force than was reasonably necessary under the circumstances to defend himself. The defendant, by his answer, put in issue the question whether he used more force than was reasonably necessary to defend himself, and the burden was upon the defendant to prove that he did not use more force than was reasonably necessary to defend himself. Galtier vs. Witzel, 82-III.-323; Hale vs. Harries, 87-III.-App.,-388.

The record does not contain a statement of the trial court relative to the motion for the new trial on his reasons for granting the same. If the record in such cases, containing the trial court's reasons for granting the new trial, it greatly aids the reviewing court in passing on such motions. The giving of instruction No. 11 was erroneous. The trial court might have granted a new trial on this instruction alone. The matter of granting or denying a motion for new trial is largely discretionary with the trial court. Unless it clearly appears from the record that that discretion has been abused, a court of review would not be justified in overturning the decision of the trial court. We find nothing in this case that indicates to us that the trial court has abused his discretion. Therefore, the judgment of the trial court will be affirmed. Affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 620²

BE IT REMEMBERED, that afterwards, to-wit: On JUN 30 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

THE UNIVERSITY OF CHICAGO

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IN THE
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1937

J. L. Jones, et al,)	
Appellants,)	
vs.	)	Appeal from Circuit
	)	Court of Marshall
	)	County, Illinois
Belle N. Horrom, et al,)	
Appellees,)	

Wolfe,--J.

This case was originally appealed to the Supreme Court but was transferred to this Court. The opinion of the Supreme Court is found in Volume 363, page 193. The statement of the case is as follows: "On June 24, 1932, Belle N. Horrom, a widow, executed and delivered her trust deed whereby she conveyed and mortgaged to J. L. Jones, as trustee, approximately 200 acres of farm land in Marshall County, Illinois, to secure an indebtedness of \$10,374.88 represented by six promissory notes signed by the grantor. Default having been made in the terms of the trust deed, the complainants, appellants here, on December 12, 1933, as respective holders of the several notes secured by the trust deed, filed their amended bill to foreclose. Among other allegations made by the bill, the complainants charged that Belle N. Horrom, at the time she made the trust deed, owned the title to the premises in fee simple.

"The bill asked for the construction of certain covenants in two deeds, the first dated December 6, 1919, made by Daniel W.

IN THE

SUPREME COURT OF ILLINOIS

Second District

May Term, A. D. 1937

Appel from Circuit
Court of Marshall
County, Illinois

I. Jones, et al.,
Appellants,
vs.
L. N. Horton, et al.,
Appellees.

file--7.

This case was originally appealed to the Supreme Court
and transferred to this Court. The opinion of the Supreme
Court is found in Volume 383, page 132. The statement of the
case is as follows: "On June 24, 1932, Belle W. Horton, a widow,
deceased and delivered her trust deed whereby she conveyed and
assigned to I. L. Jones, as trustee, approximately 800 acres of
land in Marshall County, Illinois, to secure an indebtedness
of \$10,374.38 represented by six promissory notes signed by the
decedent. Default having been made in the terms of the trust deed,
the complainants, appellants here, on December 12, 1933, as
adversely holders of the several notes secured by the trust deed,
filed their amended bill to foreclose. Among other allegations
made by the bill, the complainants charged that Belle W. Horton,
at the time she made the trust deed, owned the title to the premises
free and simple.

"The bill asked for the cancellation of certain covenants
two deeds, the first dated December 6, 1919, made by Daniel W.

Horrom and Elizabeth Horrom, husband and wife, to their son, Daniel L. Horrom, as grantee, he then being alive, conveying the same premises against which foreclosure is sought. By the terms of this deed Daniel L. Horrom 'agreed and dovenanted' to pay \$800 per annum to his parents, and the survivor of them, during the remainder of their lives. He died intestate March 1, 1921, leaving as his only heirs, his parents, his brother, Lyman T. Horrom, and his widow Belle N. Horrom. The second deed made March 28, 1921, by Daniel W. Horrom and Elizabeth, his wife, and Lyman T. Horrom and his wife, purported to convey the same premises to Belle N. Horrom. This latter deed included an alleged reservation by the parents of \$800 to be paid to them, and the survivor of them, annually, during the remainder of their lives, and also contained this statement: 'This deed is expressly subject to a separate instrument and agreement of even date herewith, made between the grantors and grantee herein; in and by which said agreement the lands shall go after the death of the grantee to the grantor, Lyman T. Horrom, during the term of his natural life, and on his death to his child or children in accordance with said agreement.'

"The bill further alleged the subsequent death of Daniel W. Horrom; charged that the alleged covenants to pay the annuity of \$800 were personal covenants of the grantees in the two deeds and did not run with the land; that by the terms of the contract of March 28, 1921, Belle N. Horrom was empowered to mortgage the premises and that she was the fee simple owner thereof, and prayed for the construction of this contract. The complainants claimed priority of the lien of the trust deed over the annual payments due Elizabeth Horrom which, with arrearages, then amounted to about \$3000, and also priority over all judgments against Belle N. Horrom.

... and Elizabeth Horron, husband and wife, to their son, Daniel L. Horron, as grantee, he then being alive, conveying the premises against which foreclosure is sought. By the terms of this deed Daniel L. Horron agreed and covenanted to pay \$800 per annum to his parents, and the survivor of them, during the remainder of their lives. He died intestate March 1, 1921, leaving as his only heirs, his parents, his brother, Lyman T. Horron, and his wife Belle M. Horron. The second deed made March 28, 1921, by Daniel L. Horron and Elizabeth, his wife, and Lyman T. Horron and his wife, purported to convey the same premises to Belle M. Horron. This latter deed included an alleged reservation by the parents of \$500 to be paid to them, and the survivor of them, annually, during the remainder of their lives, and contained this statement: 'This deed is expressly subject to a separate indenture and agreement of even date herewith, made between the grantors and grantees herein; in and by which said agreement the lands shall so after the death of the grantor to the grantee, during the term of his natural life, and on his death to his child or children in accordance with said agreement.'

"The bill further alleged the subsequent death of Daniel L. Horron; alleged that the alleged covenants to pay the sum of \$800 per annum of the grantee in the deed and did not run with the land; that by the terms of the contract of March 28, 1921, Belle M. Horron was empowered to convey the premises and that she was the fee simple owner thereof, and prayed for the construction of this contract. The complainants claimed priority of the lien of the trust deed over the annual payments due Elizabeth Horron which, with arrears, then amounted about \$800, and also priority over all judgments against Belle Horron.

"In addition to the mortgagor, the amended bill made defendants thereto, among others, the judgment creditors of Belle N. Horrom, together with Elizabeth Horrom, Lyman T. Horrom and his wife and children. Elizabeth Horrom, Lyman T. Horrom and his wife and children answered the amended bill. In addition to joining issues on the debt, they denied the priority of the debt, the validity of the trust deed as a lien on the fee simple title of the premises; claimed that Elizabeth Horrom had a freehold life estate in the lands in question, and that Belle N. Horrom was to pay her \$800, annually, for the use thereof; that by the separate agreement referred to in the deed of March 28, 1921, Belle N. Horrom agree, either by deed or will, in consideration of the latter deed to her, to pass the title to the lands to Lyman T. Horrom for his life, with the remainder in fee to his children; that Lyman T. Horrom, under the deed last named, acquired a present, vested, life estate in the lands in question; that his children took under the same deed a present, vested interest in the fee; that Belle N. Horrom had only a life estate in the lands; that the lien of the trust deed could be foreclosed only against her life estate and that the judgments against Belle N. Horrom were liens only against her life estate. By agreement of the parties it was stipulated that this answer should stand as a cross-bill. Other answers were filed by different judgment creditors alleging priority of liens as between themselves, the lien of the trust deed and the payments due Elizabeth Horrom.

"A decree of foreclosure was entered holding that Belle N. Horrom owned the fee simple title to the premises with the power to mortgage the same; that the provision as to the annual payment of \$800 to Elizabeth Horrom was an equitable lien on the

"In addition to the mortgage, the amended bill made
creditors thereto, among others, the judgment creditors of Belle
Horton, together with Elizabeth Horton, Lyman T. Horton and his
wife and children. Elizabeth Horton, Lyman T. Horton and his wife
and children answered the amended bill. In addition to joining
names on the debt, they denied the priority of the debt, the
validity of the trust deed as a lien on the fee simple title of
the premises; claimed that Elizabeth Horton had a lifehold life
estate in the lands in question, and that Belle M. Horton was to
pay her \$800, annually, for the use thereof; that by the separate
agreement referred to in the deed of March 28, 1921, Belle M.
Horton agreed, either by deed or will, in consideration of the
debt to her, to pass the title to the lands to Lyman T.
Horton for his life, with the remainder in fee to his children;
that Lyman T. Horton, under the deed last named, acquired a
present, vested, life estate in the lands in question; that his
children took under the same deed a present, vested interest in
the fee; that Belle M. Horton had only a life estate in the lands;
that the lien of the trust deed could be foreclosed only against
her life estate and that the judgments against Belle M. Horton
relate only against her life estate. By agreement of the
parties it was stipulated that this answer should stand as a cross-
petition. Other answers were filed by different judgment creditors
denying priority of liens as between themselves, the lien of the
trust deed and the payments due Elizabeth Horton.
A decree of foreclosure was entered holding that Belle
Horton owned the fee simple title to the premises with the
power to mortgage the same; that the provision as to the annual
payment of \$800 to Elizabeth Horton was an equitable lien on the

premises, superior to the lien of the trust deed ~~and superior to the~~
~~lien of the trust deed~~ and superior to the lien of the judgment
creditors; that the lien of the judgment creditors was prior to the
lien of the trust deed. From so much of the decree as adjudicated
that the lien of the trust deed was inferior to the annual payments
to Elizabeth Horrom and to the lien of the judgments against Belle
N. Horrom, the appellants appealed directly to this court. Elizabeth
Horrom, Lyman T. Horrom and his wife and children, appellees and
cross-appellants here, have appealed from that portion of the decree
which holds that Belle N. Horrom owned the fee simple title to the
premises and had the power to mortgage the same."

In the Prudential Insurance Company vs. Hodge, 359-Ill.,
page 36, the Court, in transferring the case from the Supreme Court
to this court, in their opinion say: "The rule in Illinois is that
where the plaintiff does not claim title through or under either the
mortgagee or the mortgagor he is neither a proper or necessary
party to the foreclosure proceeding, and should be dismissed from
the suit." In Whitaker vs. Irons, 300-Ill., page 254, we said:
"The only proper parties to a bill to foreclose a mortgage are the
mortgagor and the mortgagees, and those acquiring rights under them
subsequent to the mortgage."

In the present case, the mortgagee does not complain that
the trial court erred in holding that the judgment creditors had a
prior lien to his. The judgment creditors and the mortgagee are
the only parties to this litigation that acquired any right or
title to the premises from Belle N. Horrom. The only effect a
decree in this case can have, is to foreclose the lien of the mort-
gagee as against whatever title he received by the mortgage in
question.--Prudential Insurance Company vs. Hodge,-Supra. The rights

"In addition to the mortgage, the amended bill made defendants thereto, among others, the judgment creditors of Belle M. Horton, together with Elizabeth Horton, Lyman T. Horton and his wife and children. Elizabeth Horton, Lyman T. Horton and his wife and children answered the amended bill. In addition to joining issues on the debt, they denied the priority of the debt, the validity of the trust deed as a lien on the fee simple title of the premises; claimed that Elizabeth Horton had a feehold life estate in the lands in question, and that Belle M. Horton was to pay her \$800, annually, for the use thereof; that by the separate agreement referred to in the deed of March 28, 1921, Belle M. Horton agreed, either by deed or will, in consideration of the latter deed to her, to pass the title to the lands to Lyman T. Horton for his life, with the remainder in fee to his children; that Lyman T. Horton, under the deed last named, acquired a present, vested, life estate in the lands in question; that his children took under the same deed a present, vested interest in the fee; that Belle M. Horton had only a life estate in the lands; that the lien of the trust deed could be foreclosed only against her life estate and that the judgments against Belle M. Horton were liens only against her life estate. By agreement of the parties it was stipulated that this answer should stand as a cross-bill. Other answers were filed by different judgment creditors alleging priority of liens as between themselves, the lien of the trust deed and the payments due Elizabeth Horton. "A decree of foreclosure was entered holding that Belle M. Horton owned the fee simple title to the premises with the power to mortgage the same; that the provision as to the annual payment of \$800 to Elizabeth Horton was an equitable lien on the

premises, superior to the lien of the trust deed ~~and superior to the~~
~~lien of the trust deed~~ and superior to the lien of the judgment
creditors; that the lien of the judgment creditors was prior to the
lien of the trust deed. From so much of the decree as adjudicated
that the lien of the trust deed was inferior to the annual payments
to Elizabeth Horrom and to the lien of the judgments against Belle
N. Horrom, the appellants appealed directly to this court. Elizabeth
Horrom, Lyman T. Horrom and his wife and children, appellees and
cross-appellants here, have appealed from that portion of the decree
which holds that Belle N. Horrom owned the fee simple title to the
premises and had the power to mortgage the same."

In the Prudential Insurance Company vs. Hodge, 359-Ill.,
page 36, the Court, in transferring the case from the Supreme Court
to this court, in their opinion say: "The rule in Illinois is that
where the plaintiff does not claim title through or under either the
mortgagee or the mortgagor he is neither a proper or necessary
party to the foreclosure proceeding, and should be dismissed from
the suit." In Whitaker vs. Irons, 300-Ill., page 254, we said:
"The only proper parties to a bill to foreclose a mortgage are the
mortgagor and the mortgagees, and those acquiring rights under them
subsequent to the mortgage."

In the present case, the mortgagee does not complain that
the trial court erred in holding that the judgment creditors had a
prior lien to his. The judgment creditors and the mortgagee are
the only parties to this litigation that acquired any right or
title to the premises from Belle N. Horrom. The only effect a
decree in this case can have, is to foreclose the lien of the mort-
gagee as against whatever title he received by the mortgage in
question.--Prudential Insurance Company vs. Hodge,-Supra. The rights

...superior to the lien of the trust deed ...
...of the trust deed and superior to the lien of the trust
...creditors; that the lien of the trust deed was prior to the
...of the trust deed. From as much as the decree is adjudicated
...that the lien of the trust deed was inferior to the general payments
...Elizabeth Horron and to the lien of the judgment against Belle
...Horron, the appellants appealed directly to this court. Elizabeth
...Horron, Lyman T. Horron and his wife and children, appellants and
...loss-appellants here, have appealed from that portion of the decree
...which holds that Belle L. Horron owned the fee simple title to the
...appellants and had the power to mortgage the same."
...In the *Prudential Insurance Company vs. Rogers*, 259-111,
...the Court, in transferring the case from the Supreme Court
...this court, in their opinion say: "The rule in Illinois is that
...where the plaintiff does not claim title through or under either the
...mortgagee or the mortgagor he is neither a proper or necessary
...party to the foreclosure proceeding, and should be dismissed from
...the suit." In *Winkler vs. Horron*, 300-111, page 384, we said:
...is only proper parties to a bill to foreclose a mortgage are the
...mortgagor and the mortgagee, and those acquiring rights under them
...subsequent to the mortgage."
...In the present case, the mortgagee does not complain that
...the trial court erred in holding that the judgment creditors had a
...lien on his. The judgment creditors and the mortgagee are
...the only parties to this litigation that acquired any right or
...title to the premises from Belle L. Horron. The only effect
...therein in this case can have, is to foreclose the lien of the mort-
...gage as against whatever title he received by the mortgage in
...*Prudential Insurance Company vs. Rogers*, supra. The rights

of third parties cannot be litigated in this suit and should be dismissed from this proceeding.

The judgment of the trial court in holding that the mortgagee had a lien on the premises, but that the same was subject to lien of the judgment creditors is hereby affirmed.

That part of the decree that fixed the rights and interests of the other parties is hereby reversed. Affirmed in part and reversed in part.

Cause reversed and remanded.

third parties cannot be interested in this suit and should be
dismissed from this proceeding.
The judgment of the trial court in holding that the
refugee had a lien on the premises, but that the same was subject
lien of the judgment creditor is hereby affirmed.
That part of the decree that fixed the rights and interests
of the other parties is hereby reversed. Affirmed in part and
reversed in part.

Case reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

9270

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 620³

BE IT REMEMBERED, that afterwards, to-wit: On JUN 30 1937

the opinion of the Court was filed in the Clerk's

Office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1937.

The Federal Land Bank of St. Louis,
Plaintiff-Appellee

vs.

Appeal from the Circuit
Court of Kankakee County

Myrtle Love, Viola Love, Harold N.
Dennis, et al.,
Defendant-Appellants

Wolfe, - J.

In this case, the questions involved concerns who is entitled to the money in the possession of a receiver, which he had collected during the period of redemption in a foreclosure proceeding.

Melvin Love, and Myrtle Love, his wife, executed a mortgage on their farm to the Federal Land Bank of St. Louis, to secure the payment of a note of \$14,500. The mortgagors died, and their children and heirs at law, who are the appellants in this case, were made parties defendant to the foreclosure proceedings. The heirs of D.D. Dennis were also made parties defendant to the suit, upon the allegation that they appeared to have some claimed interest in the premises, a second mortgage. A Special Master in Chancery was appointed to sell the premises. After the sale there was a deficiency of \$1136.37. On January 26, 1936, the receiver for the property was appointed. The time of redemption expired on January 30, 1937. On January 25, 1937, the receiver filed his report and the same was set for hearing on February 18, 1937. On that date, an order was entered approving the receiver's report, also his payment of the full amount due upon the deficiency to the plaintiff. After the deficiency and costs were all paid, there remained in the hands of the receiver the sum of \$454.15. On the day of the hearing, the Court entered an order directing the receiver to pay to Robert M. Dennis, Laura J. Dennis, Ray Dennis, Percy D. Dennis, Harold Dennis and Laura Felts, the heirs at law of D.D. Dennis, jointly the sum of \$454.15. It is from this order that the appellants, Clayton Love, Gerald Love, Elwin Love, and

In the
APPELLATE COURT OF ILLINOIS
Second District
May Term, A. D. 1937.

The Federal Land Bank of St. Louis,
Plaintiff-Appellee

Answers from the Circuit
Court of Jackson County

vs.

Myrtle Love, Viola Love, Harold M.
Dennis, et al.,
Defendant-Appellants

Wells - 1.

In this case, the questions involved concerned who is entitled to the money in the possession of a receiver, which he had collected during the period of redemption in a foreclosure proceeding. Edwin Love, and Myrtle Love, his wife, executed a mortgage on their farm to the Federal Land Bank of St. Louis, to secure the payment of a note of \$11,500. The mortgage was made, and their children and heirs at law, who are the appellants in this case, were made parties defendant to the foreclosure proceedings. The note of \$11,500. Dennis were also made parties defendant to the suit, upon the allegation that they appeared to have some claimed interest in the property a second mortgage. A special master in Chancery was appointed to sell the premises. After the sale there was a deficiency of \$11,500. On January 26, 1936, the receiver for the property was appointed. The time of redemption expired on January 26, 1937. On January 26, 1937, the receiver filed his report and the same was set for hearing on February 18, 1937. On that date, an order was entered approving the receiver's report, and his payment of the \$11,500 amount due upon the deficiency to the plaintiff. After the deficiency and costs were all paid, there remained in the hands of the receiver the sum of \$484.12. On the day of the hearing, the Court entered an order directing the receiver to pay to Robert M. Dennis, James J. Dennis, Ray Dennis, Nancy D. Dennis, Harold Dennis and Anna Wells, the heirs at law of R.D. Dennis, jointly the sum of \$484.12. It is from this order that the appellants, Clayton Love, Gerald Love, Edwin Love, and

Glenn Love, the heirs of the mortgagors prosecuted this appeal.

No briefs nor arguments have been filed by the appellees. Our rules provide that in such cases, the judgment of the trial court may be reversed and the case remanded, but on motion of the appellants, we decided to dispose of this case upon its merits. So far as the record discloses, the appellees have taken no steps whatsoever to assert any right under their junior lien. They were defaulted in the trial court, and there is no showing that the junior mortgage pledged the rents or other income from the mortgaged property. The record does not disclose that they took any affirmative action or filed an intervening petition or request for the payment of the money that is now in dispute.

In the case of Ruprecht vs. Muhlke, 225 Ill. 188, the Court in their opinion, say: "Had the possession of said premises not been taken from the plaintiff in error by the receiver under order of the Court, she would have received the rents, issues and profits." If the receiver in this case had not been appointed, the heirs of the mortgagors would have been entitled to rents and profits from said land. It is our conclusion that the Court erred in directing that the funds in the hands of the receiver be paid to the Dennis heirs, and should have ordered it paid to the heirs of the mortgagors.

The decree of the Circuit Court of Kankakee County is hereby reversed, and the case remanded to said court with directions to enter an order that the receiver pay to the appellants, the balance ⁱⁿ remaining/his hands as such receiver. Inasmuch as there is nothing in the record to show that the appellees requested the Chancellor to enter the order of distribution, the receiver should first pay the costs of this proceeding out of the funds in his hands, and then pay the balance to the appellants.

Reversed and remanded with directions.

Glenn Love, the heirs of the mortgagors prosecuted this appeal. No briefs nor arguments have been filed by the appellees. Our rules provide that in such cases, the judgment of the trial court may be reversed and the case remanded, but on motion of the appellant, we decided to dispose of this case upon its merits. So far as the record discloses, the appellees have taken no steps whatsoever to assert any right under their junior lien. They were defaulted in the trial court, and there is no showing that the junior mortgage pledged the rents or other income from the mortgaged property. The record does not disclose that they took any affirmative action or filed an intervening petition or request for the payment of the money that is now in dispute.

In the case of *Harper v. Walker*, 225 Ill. 125, 126, the Court in their opinion, say: "What the possession of said premises has been taken from the plaintiff is error by the receiver under order of the Court, who would have received the rents, issues and profits." If the receiver in this case had not been appointed, the rents of the mortgagors would have been entitled to rents and profits from a day to day. It is our conclusion that the Court erred in directing that the funds in the hands of the receiver be paid to the junior claimant, and should have ordered it paid to the heirs of the mortgagors.

The decree of the Circuit Court of Cook County is hereby reversed, and the case remanded to said court with directions to enter an order that the receiver pay to the appellant, the balance remaining in his hands as such receiver. Inasmuch as there is nothing in the record to show that the appellees requested the Chancellor to enter the order of distribution, the receiver should first pay the costs of this proceeding out of the funds in his hands, and then pay the balance to the appellant.

Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



9227

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 620⁴

BE IT REMEMBERED, that afterwards, to-wit: On JUN 30 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS
Second District
May Term, A.D. 1937

HARRY REAMS,)	
Plaintiff and Appellee,)	
vs.	)	Appeal from County
	)	Court, Peoria
	)	County.
FREDMAN BROTHERS FURNITURE CORPORATION,)	
a corporation,)	
Defendant and Appellant.)	

WOLFE,--J.

The appellee, Harry Reams, started suit in the County Court of Peoria County against Fredman Brothers Furniture Company, claiming that the said defendant was indebted to him for overtime work performed under a verbal contract for services, entered into between the parties on October 3, 1934. The plaintiff filed with his complaint, a bill of particulars, in which he charges that during his term of employment, he worked 1,010 $\frac{1}{2}$ hours overtime. It is for this claimed overtime that this suit is brought.

The parties agree that the plaintiff was hired by the defendant to do trucking services for them delivering furniture and other articles that the defendants sell. He was hired by the month, at a stipulated price. The plaintiff claims that the contract provided that he was to work only 10 hours a day. For any overtime, and for any work performed by him on Sundays or legal holidays, he was to receive \$1.25 an hour.

In The

APPELLATE COURT OF ILLINOIS

Second District

May Term, A.D. 1927

Appeal from County
Court, Peoria
County.

HARRY REAMS,
Plaintiff and Appellee,
vs.
FREDMAN BROTHERS FURNITURE CORPORATION,
a corporation,
Defendant and Appellant

WOLFE--1.

The appellee, Harry Reams, started suit in the County Court of Peoria County against Fredman Brothers Furniture Company, claiming that the said defendant was indebted to him for overtime work performed under a verbal contract for services, entered into between the parties on October 3, 1924. The plaintiff filed with his complaint, a bill of particulars, in which he alleged that during his term of employment, he worked 1,100 hours overtime. It is for this claimed overtime that this suit is brought. The parties agree that the plaintiff was hired by the defendant to do trucking services for their delivery business and other articles that the defendant sold. He was paid by the month, at a stipulated price. The plaintiff claims that the defendant provided that he was to work only 10 hours a day. For any overtime, and for any work performed by him on Sundays or legal holidays, he was to receive \$1.25 an hour.

The contract of employment was entered into between the plaintiff himself, and Simon Brown, the manager of the defendant's corporation, and these witnesses are the only ones who testified concerning the contract.

The evidence shows that while the plaintiff was employed by the defendant, he received his pay check on Saturday of each and every week, and this check was cashed for him by the defendant's pay-master. On October 26, 1935, the plaintiff's wife purchased some furniture from the defendant's store, and plaintiff signed the conditional sales contract for said furniture, whereby he agreed to pay the defendant \$78.28 in installments of \$10 per month. At the time the plaintiff purchased this furniture, he was employed by the defendant. On the date the furniture was purchased, plaintiff claims that the defendant owed him for approximately 800 hours overtime. Plaintiff paid defendant \$10 on the conditional sales contract for each of the months of October and November, 1935. Nothing further was paid by the plaintiff to the defendant on this contract. After the plaintiff ceased to be employed by the defendant, William Siegel, the defendant's credit manager, talked with the plaintiff, and wrote to him a number of times about the payment of his account for the furniture purchased. On these several occasions, plaintiff promised to pay the account but did not do so. While plaintiff was employed by the defendant, he never presented to them a statement of his claim for overtime.

The case was tried before a jury who found the issues for the plaintiff and assessed damages in the sum of \$1263.12. The defendant entered a motion for new trial which was overruled, and judgment entered on the verdict for the full amount. The case was brought to this court on appeal.

The contract of employment was entered into between the plaintiff himself, and Simon Brown, the manager of the defendant's corporation, and these witnesses are the only ones who testified concerning the contract.

The evidence shows that while the plaintiff was employed

by the defendant, he received his pay upon a weekly basis, and every week, and this check was cashed for him by the defendant's

pay-master. On October 23, 1933, the plaintiff's wife purchased

some furniture from the defendant's store, and plaintiff signed the

conditional sales contract for said furniture, whereby he agreed

to pay the defendant \$8.00 in installments of \$1.00 per month. At

the time the plaintiff purchased said furniture, he was employed

by the defendant. On the date the furniture was purchased, plaintiff

claims that the defendant owed him for approximately 800 hours

overtime. Plaintiff paid defendant \$1.00 on one conditional sales

contract for each of the months of October and November, 1933.

Nothing further was paid by the plaintiff to the defendant on this

contract. After the plaintiff ceased to be employed by the defendant,

William Stegel, the defendant's credit manager, advised plaintiff

plaintiff, and wrote to him a number of times about the payment of

his account for the furniture purchased. He wrote several notices,

plaintiff promised to pay the account but did not do so.

Plaintiff was employed by the defendant, as shown by the

a statement of his claim for overtime.

The case was tried before a jury and the issues

for the plaintiff and defendant were as follows:

The defendant entered a motion for judgment notwithstanding,

and judgment entered on the verdict for the defendant. The case

was brought to this court on appeal.

The first assignment of error of the appellee is that the plaintiff failed to prove the contract, and his cause of action by the greater weight of the evidence, and that the verdict of the jury is against the manifest weight of the evidence.

As stated before, the contract of employment was verbal, between the plaintiff and Simon Brown, the manager of the defendant's corporation. No one else was present. If this was the only testimony concerning the contract, this court would not be inclined to reverse the judgment,-but considering the conduct of the plaintiff in buying merchandise from the defendant on the installment plan at a time at which he claims the defendant's company was indebted to him in a large amount,-and also, the fact that he received a weekly pay check until the end of his first employment without making any demand for overtime, and again when he was reemployed, he received his weekly pay check without making any demand for any overtime, and when he was finally discharged, he made no demand for any overtime, it is our conclusion that the verdict is manifestly against the weight of the evidence, and the plaintiff has not sustained his case by preponderance of the evidence as the law requires.

The judgment of the County Court of Peoria County is hereby reversed and the cause remanded.

Reversed and remanded.

The first assignment of error of the appellee is that the plaintiff failed to prove the contract, and the cause of action by the former weight of the evidence, and that the verdict of the jury is against the manifest weight of the evidence.

As stated before, the contract of employment was verbal, between the plaintiff and Simon Brown, the manager of the defendant's corporation. No one else was present. It was the only verbal contract. No one else would not be inclined to reverse the judgment, but considering the conduct of the plaintiff in buying merchandise from the defendant on the plaintiff's account at a time at which he claimed the defendant's company was indebted to him in a large amount, and also, the fact that he received a weekly pay check until the end of his first employment without making any demand for overtime, and again when he was reemployed, he received his weekly pay check without making any demand for any overtime, and when he was finally discharged, he made no demand for any overtime, it is our conclusion that the verdict is manifestly against the weight of the evidence, and the plaintiff has not sustained his case by preponderance of the evidence as the law requires.

The judgment of the County Court of Tarrant County is

hereby reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 621'

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 9 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

Gen. No. 9215

Agenda No. 12

In the Appellate Court of Illinois,

Second District

May Term, A. D. 1937.

Orrin J. Graham,

Appellant,

vs.

Appeal from the Circuit Court

of Winnebago County

John Carlson,

Appellee,

HUFFMAN-P.J.

c This is an action by appellant against appellee for personal injuries consisting of an arm injury incurred on November 12, 1935, at about 6:00 o'clock in the evening, while appellant was walking south along a cement highway near the city of Rockford, Illinois. Appellee was driving his automobile north upon this highway. The complaint consisted of two counts, the first based upon negligence and the second upon wilful and wanton conduct. A special interrogatory was submitted to the jury with respect to wilful and wanton conduct of the defendant. They answered same finding that said defendant was not guilty of wilful and wanton conduct. With respect to the first count, the jury found in favor of the defendant. The court entered a judgment on the verdict, and the plaintiff below has prosecuted this appeal.

The evidence of appellee discloses that he was driving his automobile north upon the highway in question; that he was travelling between forty and forty-five miles per hour; that it had been raining; that he had the car lights on, and that they were in good working order; that the brakes were in good condition; that as he was driving along the highway, a "shadow loomed up" upon his right, and that he swerved his car to the left; that he

In the Appellate Court of Illinois,

Second District

May Term, A. D. 1937.

Orlin J. Graham,

Appellant,

Appeal from the Circuit Court

vs.

of Winnebago County

John Carlson,

Appellee.

HUTCHMAN-P. 1.

This is an action by appellant against appellee for personal injuries consisting of an arm injury incurred on November 12, 1935, at about 6:00 o'clock in the evening, while appellant

was walking south along a street highway near the city of Rockford, Illinois. Appellee was driving his automobile north upon this highway. The complaint consisted of two counts, the

first based upon negligence and the second upon willful and wanton conduct. A special interrogatory was submitted to the jury with respect to willful and wanton conduct of the defendant.

They answered same finding that said defendant was not guilty of willful and wanton conduct. With respect to the first count, the jury found in favor of the defendant. The court entered a judgment on the verdict, and the plaintiff's motion for a new trial was denied.

This appeal.

The evidence of appellee disclosed that he was driving his automobile north upon the highway in question; that he was travelling between forty and forty-five miles per hour; that it had been raining; that he had the car lights on, and that they were in good working order; that the streets were in good condition; that as he was driving along the highway, a shadow loomed up upon his right, and that he swerved his car to the left; that he

felt "a sort of thump" on the side of his car, and brought the car to a stop in about fifty feet; that he thereupon backed the car to about the place where he had felt the thump; that as he was backing the car, a man came running toward him waving his arms; that it looked like he had an object in his hands, and appellee thought it was a holdup; that he started his car forward and proceeded to the City of Rockford and to the police station, where he reported the incident, and where he discovered that the door handle on the right side of his car was missing. The appellee was accustomed to driving this highway, and was well acquainted with same. He states that he thought someone had struck his car with some kind of an object, as he passed.

The appellant claims that as he and his companion were walking south along said highway and upon the shoulder along the east side thereof, at a distance of about four feet from the pavement, the appellee drove his car off the pavement and upon the shoulder, striking appellant and breaking his arm. About ten minutes after the accident happened, the witness Braham came along in his car proceeding south. This witness states he saw a couple of men lying on the ground along the east side of the highway. Upon stopping to investigate, he found them to be appellant and his companion. The witness took them in his car to the Transient Camp where they were living. Appellant's companion was not injured in any way. The evidence of the Camp Director is to the effect that he was serving as Camp Director at Transient Camp No. 1, at Rockford, and in charge of said camp; that he was present when appellant was brought to the camp with a broken arm; that he examined him, discovered his arm was broken, administered slight treatment by placing the same in a sling, and took the injured man to St. Anthony's Hospital. The testimony of the Camp Director is to the effect that appellant was drunk. It appears that he had a partially filled bottle of whiskey in his pocket when

felt "a sort of bump" on the side of his car, and thought the car to a stop in about fifty feet; that he thereupon moved the car to about the place where he had left the car; that he was backing the car, a man was running toward him waving his arms; that it looked like he had an object in his hands, and appellant thought it was a goldcup; that he started his car forward and proceeded to the City of Los Angeles and to the police station, where he reported the incident, and where he discovered that the door handle on the right side of his car was missing. The appellee was accustomed to drive this highway, and was well acquainted with same. He stated that he thought someone had struck his car with some kind of an object, as he passed. The appellant claims that at the time he was driving along the highway with his car and upon the east side thereof, at a distance of about four feet from the west, the appellee drove his car off the pavement and upon the shoulder, striking appellant and breaking his arm. About ten minutes after the accident happened, the witness Brown came along in his car proceeding south. This witness stated he saw a couple of men lying on the ground along the east side of the highway. Upon stopping to investigate, he found them to be appellant and his companion. The witness said that he took them to the transient camp where they were living. Appellant's companion was not injured in any way. The witness of the camp also stated to the effect that he was sitting at the transient camp No. 1, of Los Angeles, and in charge of said camp; that he was present when appellant was brought to the camp after the accident; that he examined him, discovered his arm was broken, administered first treatment by placing the arm in a sling, and took him to St. Anthony's Hospital. The testimony of the camp director is to the effect that appellant was injured. It appears that he had a partially filled bottle of whiskey in his pocket when

he arrived at the hospital. The surgeon at the hospital states that appellant was under the influence of liquor at the time he was brought there. The companion who was with appellant at the time of his injury, and who was also an inmate of the Transient Camp, did not appear as a witness.

Appellant urges three points for reversal; First, incompetent testimony; second, erroneous instructions; and third, that the court erred in overruling his motion for a new trial. The third point is not argued. The record in this case has been carefully examined. Nothing appears therein to cause this court to believe that a subsequent jury would find differently on the facts, than did the jury in this case. The evidence complained of is not considered sufficient to constitute reversible error. We are of the opinion that appellant had a fair trial and that the issues in the case were clearly before the jury, that the jury was fairly instructed by the court, and not misled by any of the instructions of which appellant complains.

Judgment affirmed.

Dove, J, Dissents.

he arrived at the hospital. The surgeon at the hospital states that appellant was under the influence of liquor at the time he was brought there. The companion who was with appellant at the time of his injury, and who was also in custody of the defendant Camp, did not appear as a witness.

Appellant argues three points for reversal; first, incompetent testimony; second, erroneous instructions; and third, that the court erred in overruling his motion for a new trial. The

third point is not argued. The record in this case has been carefully examined. Nothing appears therein to show this court to believe that a reasonable jury would find differently on the facts, than did the jury in this case. The evidence complained of is not considered sufficient to constitute reversible error. We are of the opinion that appellant had a fair trial and that the issues in the case were clearly before the jury, that the jury was fairly instructed by the court, and not misled by any of the instructions or which appellant complains.

Judgment affirmed.

Dove, J., dissents.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 621²

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 9 1937 the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1937.

Herman Derner,

Appellee,

vs.

Appeal from the Circuit Court

of Rock Island County

John J. Morton,

Appellant,

HUFFMAN-F.J.

This is an action brought by appellee against appellant for personal injuries sustained by reason of being struck by an automobile operated by appellant. The accident occurred at the intersection of Twenty-First Street and Fourth Avenue in the City of Rock Island. Appellant was proceeding south until he came to the intersection of this street and Fourth Avenue, when he turned his car to the east on Fourth Avenue. Appellee was attempting to cross Fourth Avenue from the north to the south side thereof. There were two sets of street car tracks on Fourth Avenue. The accident happened on the north set of tracks at a time when appellant was in the act of passing another automobile going east and travelling along the south set of tracks. The accident occurred on September 14, 1935, at about 9:00 o'clock in the evening. The cause was tried by jury which returned a verdict in favor of the plaintiff below for \$1715.25. The defendant below prosecutes this appeal from the judgment of the court on said verdict.

The appellant assigns a number of errors for reversal, among which are those going toward certain instructions given on behalf of appellee. For the purpose of this opinion, our consideration will be directed toward same.

In the Appellate Court of Illinois

Second District

May Term, A. D. 1937.

Herman Berner,

Appellee,

appeal from the Circuit Court

of Rock Island County

v.

John J. Morton,

Appellant,

HUTCHINSON-7.

This is an action brought by appellee against appellant for personal injuries sustained by reason of being struck by an automobile operated by appellant. The accident occurred at the intersection of Twenty-First Street and Fourth Avenue in the City of Rock Island. Appellant was proceeding south until he came to the intersection of this street and Fourth Avenue, when he turned his car to the east on Fourth Avenue. Appellee was attempting to cross Fourth Avenue from the north to the south side thereof. There were two sets of street car tracks on Fourth Avenue. The accident happened on the north set of tracks at a time when appellant was in the act of passing another automobile going east and traveling along the south set of tracks. The accident occurred on September 14, 1935, at about 2:00 o'clock in the evening. The case was tried by jury which returned a verdict in favor of the plaintiff below for \$15,000. The defendant below prosecutes this appeal from the judgment of the court on said verdict.

The appellant assigns a number of errors for reversal, among which are those going toward certain instructions given on behalf of appellee. For the purpose of this opinion, our consideration will be directed toward same.

Appellee's instruction No. 5 deals with the question of a preponderance of the evidence with respect to the number of witnesses testifying to a particular fact or state of facts, and concludes with the following sentence: "A number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is, however, the proper element for the jury to consider in determining where lies the preponderance of the evidence." Appellee answers the objection to this instruction by stating that: "It is readily apparent that the word 'the' was intended by the court to be 'a'." Appellee also urges that instructions No. 6 and 18 cure No. 5. The court is unable to agree with appellee.

Appellant objects to instruction No. 9 given on behalf of appellee. This is an instruction which directs a verdict. Such instructions must limit the jury to the negligence of wrongful conduct charged against the defendant in the complaint. *Garnhart v. Reeves*, 288 Ill. App. 159. The above instruction was defective in this respect. It directed and authorized a recovery for negligence generally, without limiting the same to that charged in the complaint.

Appellee's instruction No. 4 had to do with the burden of proof and closed by stating to the jury: "Still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it will be sufficient for the jury to find the issues in his favor." Instructions of this nature, to the effect that if the evidence preponderates in plaintiff's favor, although but slightly, it will be sufficient for the jury to find the issues for the plaintiff, have been severely criticized, and in cases where the plaintiff's evidence did not clearly preponderate, have been held erroneous. *Wolczek v. Public Service Co.*, 342 Ill. 482, 495; *Williams v. Stearns*, 256

Appellee's instruction No. 3 deals with the question of a preponderance of the evidence with respect to the burden of witnesses testifying to a particular fact or state of facts, and concludes with the following sentence: "A number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is, however, the proper element for the jury to consider in determining where lies the preponderance of the evidence." Appellee answers the objection to this instruction by stating that: "It is readily apparent that the word 'and' was intended by the court to be 'or'." Appellee also urges that instructions No. 6 and 13 cure No. 3. The court is unable to agree with appellee.

Appellant objects to instruction No. 3 given on behalf of appellee. This is an instruction which directs a verdict. Such instructions must limit the jury to the negligence of wrong-ful conduct charged against the defendant in the complaint. *Garnhart v. Reeves*, 284 Ill. 491, 129. The above instruction was defective in this respect. It directed and authorized a recovery for negligence generally, without limiting the same to that charged in the complaint.

Appellee's instruction No. 4 had to do with the burden of proof and closed by stating to the jury: "Still, if the jury find that the evidence bears upon the plaintiff's case a preponderance in his favor, although but slightly, it will be sufficient for the jury to find the issue in his favor." Instructions of this nature, to the effect that if the evidence preponderates in plaintiff's favor, although but slightly, it will be sufficient for the jury to find the issue for the plaintiff, have been severely criticized, and in cases where the plaintiff's evidence did not clearly preponderate, have been held erroneous. *Wolcott v. Public Service Co.*, 325 Ill. 482, 492; *Illinois v. Stearns*, 326

Ill. App. 425, 433; Dean v. Yellowway Pioneer System, Inc., 259 Ill. App. 180, 192.

Appellee urges the rule that if a case is not close on the facts and the evidence sustains the verdict, that errors in instructions will not necessarily work a reversal. Such rule prevails, yet it must be administered in view of the entire record, and a court of review will not adopt such rule, unless from a review of the record it appears to the satisfaction of the court that the jury was not misled thereby, thus precluding the likelihood of the same having been prejudicial to a litigant's rights. Otherwise, the verdict will be set aside. Franks v. Matson, 211 Ill. 338, 343.

The purpose of instructions is to convey to the jury correct principles of law as apply to the evidence in the case and the allegations of the complaint, so that the jury by application of correct rules of law to the evidence, may arrive at a proper and legal conclusion according to the law and the evidence. It is to be presumed that respective counsel have prepared the instructions before trial and at a time when care and accuracy may be readily employed. Under the practice in this state, the trial court is compelled to read and determine the correctness of the instructions during argument of the case to the jury. This is an added reason why care should be exercised in the preparation of instructions in order that they may not only state correct principles of law, but may state them correctly.

For the errors above indicated, the judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

Ill. App. 432, 433; *Arm v. Attorney Fisher System, Inc.*, 350

Ill. App. 180, 182.

Appellate review is not close on the facts and the evidence sustaining the verdict, but errors in instructions will not necessarily work a reversal. Such rule prevails, yet it must be administered in view of the right of a jury, and a court of review will not adopt such rule, unless from a review of the record it appears to the satisfaction of the court that the jury was not misled thereby, thus preserving the likelihood of the same having been prejudicial to a defendant's rights. Otherwise, the verdict will be set aside. *Franklin v. Watson*, 311 Ill. 338, 343.

The purpose of instructions is to convey to the jury correct principles of law as apply to the evidence in the case and the allegations of the complaint, so that the jury by application of correct rules of law to the evidence, may arrive at a proper and legal conclusion according to the law and the evidence. It is to be presumed that a jury will have proper and correct instructions before trial and at a time when they are necessary may be readily employed. Under the practice in this state, the trial court is compelled to read and explain the correctness of the instructions during argument of the case to the jury. This is an added reason why care should be exercised in the preparation of instructions in order that they may not state correct principles of law, but may state them incorrectly. For the errors above indicated, the instruction is reversed and the cause remanded for a new trial.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 621³

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 9 1937 the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A. D. 1937.

Ethel McClary, Administratrix
of the Estate of Amel W. McClary,
Deceased,

Appellee

vs.

Grand Lodge Brotherhood of
Railroad Trainmen,

Appellant.

Appeal from the Circuit

Court of Kankakee County

DOVE, J.

On March 25th, 1919 Amel W. McClary executed an application for a benefit certificate to be issued to him by the Grand Lodge Brotherhood of Railroad Trainmen. On June 17, 1919 the beneficiary certificate which forms the basis of this action was issued. According to its terms, it entitled McClary to participate in the beneficiary department of the Brotherhood to the extent to Twenty-eight Hundred Dollars, which amount would be paid upon the death of the member insured or upon his becoming totally and permanently disabled within the meaning of Section 68 of the Constitution of the Brotherhood. This Section 68 provides that any beneficiary in good standing, who shall suffer the complete and permanent loss of sight of one or both eyes shall be ~~entitled~~ considered totally and permanently disabled and shall be entitled to receive, upon furnishing sufficient and satisfactory proof of such total and permanent disability, the full amount of his beneficiary certificate.

Section 69 of the Constitution provides that proofs of total and permanent disability shall be made by the insured and the secretary of the lodge of which the insured is a member, by promptly making statements in writing of such disability on the form prescribed by the Brotherhood and under the seal of the lodge, which statement

THE UNIVERSITY OF CHICAGO

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of the State of New York
County of New York

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—

Grand Lodge Brotherhood of
United Traders

1010

DOVT

[illegible]

A similar certificate is issued to him by the State Police.

hood of Julius & Ethel. On June 17, 1961 the defendant was arrested.

which forms the basis of this action was incorrect. According to the

100-443887-100

... .. To June

which amount would be paid upon the death of the insured is

upon his second total, and consequently that I will be able to

...the to to

83 provides that any beneficiary is not eligible who will

the complete and permanent loss of sight of one or both eyes.

CO-ENTRUSTED TO THE NATIONAL ARCHIVES, COLLEGE PARK, MARYLAND

Proof of the above claim is left to the reader. \square

Approved: _____

Section 59 of the Constitution provides that:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Secretary of the House of Representatives

Redding was not so ill-favored as to suffer at someone's hand

by the Incorporated and under the seal of the latter, and of statement

shall be signed by the President and Treasurer of the subordinate lodge and that the attending physician shall make a sworn statement setting forth the nature and the extent of the injury and that these proofs, including the beneficiary certificate and all receipts for all dues and assessments paid by the member are to be forwarded to the Secretary and Treasurer of the Grand Lodge of the Brotherhood for allowance or rejection of the claim.

On September 25th, 1931, McClary instituted this suit, claiming that he was entitled to the benefits under his certificate as provided by the constitution and by-laws of the Brotherhood because of his loss of sight. Before trial, the insured died and his administratrix was substituted as plaintiff. By appropriate pleas the defendant urged that no liability existed because the insured at the time of making his application was afflicted with arthritis of the spine and that the answer in his application wherein he had stated that he had never had inflammation or other disorder of the spine was false and untrue. The pleas of the defendant also raised the question whether the insured had lost his sight within the meaning of the provisions of the certificate. At the close of all of the evidence, the jury, in obedience to a peremptory instruction, returned a verdict in favor of the plaintiff and against the defendant for \$2800.00. Upon this verdict judgment was rendered and the Brotherhood appealed to this Court. Upon a review of the record, we concluded that the question whether McClary made a false answer in his application in his reply to the question whether he was afflicted with inflammation or disease of the spine and whether the allegations of his declaration to the effect that he was blind in his right eye, were questions of fact which should have been submitted to the jury. We therefore reversed the judgment and remanded the cause for another trial. McClary v. Grand Lodge Brotherhood of Railroad Trainmen, 269 Ill. App. 658.

Upon the cause being reinstated in the trial court, various amendments were made to the pleadings and the cause was again sub-

shall be aimed by the President and Treasurer of the subordinate lodge and that the attending physician shall make a sworn statement section forth the nature and the extent of the injury and that those proofs, including the medical certificate and all receipts for all dues and assessments paid by the member are to be forwarded to the Secretary and Treasurer of the Grand Lodge of the Jurisdiction for allowance or rejection of the claim.

On September 10th, 1901, a letter informed this court, stating that he was entitled to the benefits under his certificate as provided by the constitution and by-laws of the subordinate lodge of his loss of sight. Before trial, the injured died and his estate's estate was substituted as plaintiff. It was contended by the defendant that no liability existed because the terms of the policy of said life insurance was afflicted with epilepsy of the spine and that the answer in his application therein he had stated that he had never had inflammation or other disorder of the spine and false and untrue. The plaintiff also raised the question whether the insured had lost his sight within the meaning of the provision of the certificate. Is the claim of all of the witnesses, the jury, in obedience to a proper jury instruction, returned a verdict in favor of the plaintiff and against the defendant for \$2000.00. Upon this verdict judgment was rendered and the defendant appealed to this court. Upon a review of the record, we considered that the question whether whether really made a false answer in his application in his reply to the question whether he was afflicted with inflammation or disease of the spine and whether the inflammation of the spine was the effect of the fact that he was afflicted with the same, were questions of fact which should have been submitted to the jury. On October reversed the judgment and remanded the cause for another trial. *McClary v. Grand Lodge Jurisdiction of Illinois*, 200 Ill. 401, 402.

Upon the cause being remanded to the trial court, various amendments were made to the pleadings and the cause was again set-

mitted to a jury resulting in a verdict for the plaintiff for \$2800.00. Upon this verdict, judgment was rendered and the Brotherhood again appealed, and this judgment was again reversed and the cause remanded. McClary v. Grand Lodge Brotherhood of Railroad Trainmen, 282 Ill. App. 77. Another trial in the Circuit Court resulted in a verdict in favor of the plaintiff for \$2800.00 and interest and upon this verdict the trial court entered, on September 2, 1936, a judgment for \$3,608.46 and the record is again before us for review.

Before the second trial in the Circuit Court, the plaintiff amended her declaration and as amended it consisted of five counts. The first count as amended alleged the execution and delivery of the benefit certificate, set forth the certificate itself, averred that the insured complied with the constitution, regulations and general rules of the Brotherhood and paid all dues required of him until the filing of the instant suit. It further alleged that in the year 1931 the insured suffered complete and permanent loss of the sight of both eyes, that thereafter he made proof of his said disability in accordance with said certificate and with the constitution, regulations and general Rules of the Brotherhood, that the secretary of the local lodge of which the insured was a member and the insured promptly, after said disability, made statements in writing of such disability on the form prescribed and under the seal of the lodge, which statements were also signed by the president and treasurer of the local lodge, that insured's attending physician made a statement in writing setting forth the nature and extent of the injury and all proofs, including the certificate of plaintiff's intestate and his receipts for dues and assessments for the month in which said disability occurred were caused by plaintiff's intestate to be forwarded to the general secretary and treasurer of defendant. That said claim was denied by defendant and on August 21, 1931 the defendant canceled said benefit certificate.

...in a jury verdict in a verdict for the plaintiff for \$200,000. Upon this verdict, judgment was rendered and the plaintiff had again appealed, and this judgment was again reversed and the cause remanded. *McClary v. Great Lakes Transportation Co. of Detroit*, 221 Ill. App. 77. Another trial in the Circuit Court resulted in a verdict in favor of the plaintiff for \$200,000 and upon this verdict the trial court entered, on September 2, 1933, a judgment for \$2,500.00 and the record is again before us for review.

Before the second trial in the Circuit Court, the plaintiff amended her declaration and as amended it contained the following: The first count as amended alleged the removal and delivery of the benefit certificate, and forth the certificate itself, avowed that the insured complied with the conditions, regulations and general rules of the Brotherhood and paid all dues required of him until the filing of the instant suit. It further alleged that in the year 1931 the insured suffered complete and permanent loss of the sight of both eyes, that therefore he made proof of the said disability in accordance with said certificate and with the conditions, regulations and general rules of the Brotherhood, that the proceeds of the local lodge of which the insured was a member and the benefit payable after said disability, were wrongfully withheld from him, and that on the form prescribed and under the seal of the lodge, which statements were also signed by the president and secretary of the local lodge, that insured's attending physician made a statement in writing setting forth the nature and extent of the injury and ill health, and signed the certificate of said ill health and the local lodge for dues and assessments for the month in which said disability occurred were issued by plaintiff's insurance to be turned to the general secretary and treasurer of defendant. That said sums were paid to defendant and on August 11, 1933 the defendant cancelled said benefit certificate.

The second amended count averred the execution and delivery of the benefit certificate, the compliance by plaintiff's intestate with the constitution, regulations and general rules of the Brotherhood, the payment of dues and the loss of sight by the insured. It is then alleged that the insured, through one C. D. Cary, entered into correspondence and negotiations with defendant's local lodge and grand lodge and demanded payment under Section 68, for complete and permanent loss of sight of both eyes, that the defendant thereafter ended said negotiations and refused to pay the insured any benefits, and canceled the certificate on the ground that the insured was not completely and permanently disabled according to the general rules, laws and constitution of the defendant. As a part of this count, the second page of Cary's letter to defendant under date of August 1, 1931 hereinafter referred to, was set forth.

The third count as amended is similar to the second except instead of alleging that defendant canceled the certificate on the ground that insured was not completely and permanently disabled, this count averred that the defendant refused to pay the claim under Section 68 and canceled said certificate on account of plaintiff's intestate's mis-statements as to his vision.

The fourth count as amended is similar to the third count except that instead of alleging that defendant canceled the certificate on account of plaintiff's intestate's mis-statements as to vision, averred that the defendant refused to pay under said section 68 and canceled said certificate on the ground that plaintiff's intestate had arthritis prior to making application for said certificate.

The fifth amended count alleges the issuance of the certificate and the disability as averred in the other counts and alleges that plaintiff's intestate made proof thereof upon forms furnished by the defendant, that said proof of loss was signed and sworn to by the attending physician, Dr. D. J. O'Loughlin, that it set forth that plaintiff's intestate was suffering from the complete and permanent

[illegible]

Under Section 83 the accused was convicted on account of being
this court agreed that the defendant refused to pay the fine
from that interest was not completely and permanently satisfied,
instead of the fact that defendant accepted the certificate on the
the first count as stated is similar to the second count.

1. The first point to be noted is that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Bill. It is therefore not possible to say whether the amendments are likely to be accepted or not.

The time needed about fifteen minutes for the collection and the analysis of the water in the water supply and the water in the water supply.

loss of the sight of the right eye and impaired vision of the left eye, that said proof was not made as a benevolent claim but defendant refused to pay the same for the express reason that the insured was not permanently disabled and canceled said certificate on August 21, 1931.

To this amended declaration the defendant filed the general issue and five special pleas. By the first special plea defendant insisted it was not liable because the assured did not make proof of permanent disability within six months after the disability occurred as required by Section 64 of the constitution of the defendant. By the second special plea defendant insisted it was not liable because the assured did not commence the instant suit within six months after March 9, 1931, at which time defendant's Board of Insurance rejected plaintiff's intestate's claim, as required also by said Section 64 of its constitution. By the third special plea, defendant insisted that no declaration was on file herein which stated a cause of action until October 14, 1933, which was more than ten years after the alleged cause of action occurred. By the fourth special plea, defendant insisted it was not liable because the insured answered in his application that he had never had any inflammation, or disorder of the spine, brain or nervous system, which answer he warranted to be true, that said answer was false, that previous to executing said application he was afflicted with a disorder of the spine and that immediately upon a discovery of these facts, defendant canceled said certificate and tendered the assured \$483.80, being the full amount of his beneficiary assessments. The fifth special plea set out Section 69 of defendant's constitution and averred that the insured did not furnish a physician's statement or make proof showing any total permanent disability pursuant to the provisions of Sections 68 and 69.

The beneficiary certificate stated that it was issued upon the express condition that McClary should comply with the constitution, general rules and regulations now in force or which may hereafter be adopted by the Brotherhood, which, as printed and published by the Grand Lodge, with the application for this certificate and with the

medical examination and the certificate, shall constitute the contract between McClary and the Brotherhood. When the certificate was delivered to McClary, it had copies of the application and the medical examination attached to it and the secretary and the treasurer of the lodge certified on it that McClary had accepted the certificate upon the conditions therein set forth.

Section 64 of the constitution provides that all right of action upon the beneficiary certificate should be absolutely barred unless proofs of total and permanent disability should be forwarded to the general secretary and treasurer within six months after such disability occurred and should be likewise barred unless such action should be commenced in some court of competent jurisdiction within six months after the final rejection of the claim of the Board of Insurance.

The proof is that the benefit certificate was dated May 1, 1919 and duly issued and accepted by the insured, who paid dues thereon to and including August, 1931. That on August 27, 1930 the insured filed a petition, directed to the local lodge, for a benevolent claim under Sections 70 and 71 and submitted with it a statement by Dr. D. J. O'Loughlin in which he certified that he had made a physical examination of McClary on August 20, 1930, which disclosed that he had "an optic atrophy, complete, right eye" and that the visional efficiency of his right eye was a total loss and that his condition was permanent. It further appeared from McClary's written declaration to the Brotherhood that he first engaged in train service on November 7, 1918 and that he left the service on June 24, 1922, that Dr. D. J. O'Loughlin was his attending physician and that he had lost the sight of his right eye. To the question: "Date of injury or first sickness leading to present condition?" he answered: "23rd Jan. 1923." Under date of September 7, 1930, the president and secretary of the local lodge at Kankakee wrote the Beneficiary Board of defendant at Cleveland that the petition was duly considered by the local lodge and approved.

medical examination and a certificate, which should be the
contract between the two parties. When the certificate
was delivered to the party, it was signed by the physician and the
medical examining witness to it and the physician and the witness
of the former parties in it were signed and accepted the certificate
upon the condition therein set forth.

Section 86 of the constitution provides that all right of action
when the medical certificate should be immediately before the
proof of fact and payment of liability should be forwarded to the
general secretary and returned within the month after each dis-
ability occurred and should be likewise forwarded within each month
should be forwarded in case of complete disability within
six months after the final rejection of the claim of the board of
examiners.

The proof is that the medical certificate was given by
1919 and duly issued and accepted by the insured, and said was
forwarded to the examining witness, 1919. Then on August 17, 1920 the
insured filed a petition, directed to the local board, for a
pensionant claim under section 70 and 71 and submitted with it a
statement by Dr. J. J. O'Connell in which he certified that he had
made a physical examination of the insured on August 10, 1920, when
discovered that he had an optic atrophy, deafness, right eye and
lost the vision of the right eye for a total loss and
that his condition was permanent. It is further stated that the
written certificate to the pensioner was then received in
train service on November 7, 1920 and that on 1920 the service on
June 25, 1921, that Dr. J. J. O'Connell was an attending physician
and that he had lost the right of his vision. To the question:
"Was it injury or third disease leading to permanent disability?"
he answered: "Third Jan. 1921." Under date of November 7, 1920,
the pensioner and members of the local board at Chicago wrote
the pensioner board of Chicago as directed that the pension
was duly awarded by the local board and approved.

On December 4, 1930 notices were sent to the Treasurer of McClary's local lodge and to McClary, containing the information that his disability claim had been disapproved by the Beneficiary Board. McClary was further informed at this time that the action of the Beneficiary Board would be reported to the Board of Insurance at the next annual meeting of the Grand Brotherhood and that if he so desired, he might appear before this Board the last week in January and the letter advised him to address all correspondence to the Grand Secretary and Treasurer. The reason given in the notice for the rejection of the Benevolent Claim was that in the judgment of the Beneficiary Board the claimant was not totally and permanently disabled according to the laws of the Brotherhood. It appears that McClary appeared before the Board of Insurance and that at the annual meeting of the Grand Brotherhood held in the last week of January, 1931, the action of the Beneficiary Board disapproving the claim was sustained by the Board of Insurance and subsequently McClary and the secretary of his local lodge were informed, on March 9, 1931, of the action of the Board definitely rejecting his claim.

The evidence further discloses that along the first part of May, 1931 McClary consulted Mr. C. J. Cary, an attorney and friend, who interested himself in McClary's claim and on May 7, 1931 Cary wrote the head officers of the Brotherhood in Cleveland that in order to satisfy himself of the merits of McClary's claim, he, Cary, had had McClary examined by several physicians and that their finding was to the effect that McClary was wholly and permanently disabled, suffering from a malady he may not outlive, that he is not able to perform manual labor or earn a livelihood, that he goes about stooped and crippled and is sick and wholly unable to work. In this letter Cary expressed the opinion that McClary's claim was a meritorious one and asked the Brotherhood to re-open his case and reconsider its action of March 9, 1931, which finally rejected McClary's claim. On May 11, 1931, the General Secretary and Treasurer of defendant replied to Cary, informing him that all the officers and the various boards of

On December 4, 1933 notices were sent to the Treasurer of
Society's local board and to the Secretary, requesting that
these two officials should be present at the next annual meeting
of the Society. The Secretary was further informed that the
Society would be reported to the Board of Directors at
the next annual meeting of the Board of Directors and that it was
desired, as stated above, that the Secretary and the Treasurer
and the latter advised him to inform all representatives to the Board
Secretary and Treasurer. The present Board in the notice for the
rejection of the Association's claim was that in the judgment of the
Society's Board the claim was not valid and was accordingly dis-
missed according to the law of the Association. It appears that
Society appeared before the Board of Directors and that at the annual
meeting of the Board of Directors held in the last week of January,
1931, the action of the Society's Board disapproved the claim was
announced by the Board of Directors and subsequently the Secretary of the
Society of the local board were informed, on March 9, 1931, of the
action of the local board, rejecting the claim.

The evidence further discloses that about the first part of May,
1931 Society contacted Mr. E. E. Carr, an attorney and friend, who
advised him that in Society's claim and on May 7, 1931 Carr wrote the
head office of the Association in Washington that in order to satisfy
himself of the merits of Society's claim, he, Carr, had had the claim
examined by several physicians and that while the claim was to the
effect that Society was weakly and generally ill, Carr, having
from a medical point of view, that he was not satisfied, that he was not
satisfied, that he was not satisfied, that he was not satisfied, that
annual factor on him a livelihood, that he was not satisfied, that
originally and in the past and while unable to work. In this letter Carr
expressed the opinion that Society's claim was a medical one and
asked the Association to re-open the case and re-examine the claim
of March 9, 1931, which finally rejected Society's claim. On May 11,
1931, the National Secretary and Treasurer of the Association replied to
Carr, informing him that all the officials and the various boards of

defendant were in convention at Houston, Texas, that McClary's claim must be referred to the Beneficiary Board and that its members would return sometime the first of June and expressed regret that the matter must necessarily be delayed. On June 29th, 1931, the General Counsel of defendant wrote Cary, but this letter was not introduced in evidence but on August 1, 1931, Cary replied and advised the General Counsel that Dr. Greenman and Dr. Cannon had recently examined McClary and found that he was suffering from arthritis of the spine, that arthritis was progressive and that he was totally and permanently disabled, that two physicians had reported that McClary was without sight in his right eye and that his vision in his left eye was badly impaired, that these reports of McClary's physical condition bring him within the provisions of Sections 69 and 70 of the contract of insurance and that the condition of his eyesight brings him within Section 68 of the contract and his case is therefore lifted from the consideration of the Benevolent side of the contract and he is entitled to the payment of his insurance at once. In this letter Cary also wrote: "You desired some army information concerning this man and I have had him supply me with the discharge papers showing that he was in the army three days and was discharged way back in June, 1918 as then having this arthritis of the spine and was then considered as unfit for army service, with the disease a progressive one, you can understand something of the condition of this man thirteen years thereafter. It will be necessary that you return me this army certificate when it shall have served its purpose to you." To this letter the General Counsel replied under date of August 4, 1931 as follows: "In re - Amel W. McClary, I.700. This will acknowledge receipt of yours of the 1st inst. containing certain additional proof in re the claim of Amel W. McClary. This has been referred to the beneficiary board and the claimant should be advised as to their action at an early date. I am returning herewith his certificate of discharge from the army, after having taken a photostatic copy of the same."

defendant were in conversation at Houston, Texas, that defendant's claim
must be referred to the beneficiary board and that the board would
return sometime the first of June and expressed regret that the matter
must necessarily be delayed. On June 22nd, 1901, the General Counsel
of defendant wrote him, but this letter was not introduced in evidence
but on March 1, 1901, Gary replied and advised the General Counsel that
Mr. Greenman and Mr. Hanson had previously examined him and found
that he was suffering from strabismus at that time, that strabismus
was progressive and that he was totally and permanently disabled, that
two physicians had reported that he was, was almost blind in his right
eye and that his vision in his left eye was badly impaired, that these
reports of doctor's physical condition during his illness and previous
of sections 69 and 70 of the contract of insurance and that the condi-
tion of his vision during his illness section 69 of the contract and
his case is therefore lifted from the consideration of the insurance
side of the contract and he is entitled to the payment of his insurance
at once. In this letter Gary also wrote: "You had not been blind in-
formation concerning this man and I have not the right to with the
discharge report should that be in the case, then you and the
discharge was made in June, 1901, and then having this strabismus of the
eye and was then considered as being the same condition, with the
discharge a progressive one, you can understand the condition of the strab-
tion of this man without more delay. It will be necessary that you
return to this very condition and I shall have passed the burden
to you." In this letter the General Counsel replied under date of
August 4, 1901 as follows: "It is - good - letter, I see. This
will undoubtedly result at once at the first. I understand that
this additional proof is to the effect of June 1, 1901. This has
been referred to the beneficiary board and the board should be
advised as to their action at an early date. I am very much inter-
ested in the case of discharge from the army, after having taken a
protestant copy of the same."

On August 14, 1931, the defendant, from its general offices in Cleveland, wrote the secretary of the local lodge at Kankakee as follows: "This is to advise you that the Beneficiary Board found it necessary to disapprove the benevolent claim of Brother Amil W. McClary of your lodge, cancel his beneficiary certificate and order the return of beneficiary and tuberculosis assessments remitted on his account from the date of his admission as a class D member May, 1919 to August, 1931 inc. on account of misstatements in form 131 relative to his vision. This action is in accordance with Sections 59 and 140 of the Constitution, the former reading as follows - 'If any untrue or incomplete answers shall be made in said application, then the certificate issued thereunder and said contract shall be absolutely null and void. I am enclosing check No. C 23130 in the sum of \$483.80 payable to Amil W. McClary, which kindly deliver to him after he has signed the enclosed receipt in the presence of a witness, returning the voucher to the undersigned. You should not accept any further beneficiary assessments on behalf of Brother McClary. If he desires he may remain in the organization as an honorary member." On August 19, 1931, Cary wrote the Brotherhood to the effect that McClary had received a copy of its letter to the secretary of the local lodge, wherein McClary's claim had been rejected upon the ground that he had made mis-statements concerning his vision, that he had advised McClary not to accept the voucher for \$483.80 and that suit would be instituted on the certificate. On August ~~22~~ 21, 1931 the general secretary and treasurer of defendant wrote Cary acknowledging receipt of his letter of the 19th and stating that McClary's "membership was canceled relative to his having arthritis prior to his making application for beneficiary certificate, of which he made no mention" and not because of misstatements relative to his vision. Thereafter and on September 25, 1931 McClary instituted this suit.

The constitution of the Brotherhood also contained a provision permitting the membership to present claims not coming within the terms of Section 68 of the Constitution. Such claims are designated "Benevolent Claims" and they are provided for in Sections 70 and 71 of the Constitution. Section 70 provides that such claims shall be addressed to the Benevolence of the Brotherhood and shall in no case be made the basis of any legal liability on the part of the Brotherhood. This section also provided that all Benevolent claims disapproved by the Beneficiary Board were to be reported to the Board of Insurance at the next annual meeting of the Brotherhood for such disposition as the Board of Insurance shall deem just and proper. Section 71 provides that a member desiring to present a claim under Section 70 shall petition his lodge in writing upon the form provided by the General Secretary and Treasurer, which petition is to be executed by the member and a local physician showing the condition of the member and the basis of his claim.

Section 59 of the constitution and general rules of the Brotherhood provided that all applications for beneficiary certificates should be made upon regular forms provided by the Grand Lodge, that said application should become the basis of the contract between the parties, that all statements and answers therein made shall be adopted as the applicant's, admitted to be material and, in any case, if any untrue or incomplete answers are made in the application, then the certificate issued thereunder and the contract shall be absolutely null and void. Section 60 provided that the beneficiary certificate involved herein provides for the payment of Twenty-eight Hundred Dollars.

On behalf of the plaintiff, Dr. S. W. Lane testified that he was the medical examiner for the Brotherhood and examined McClary at the time he applied for this insurance in March 1919. He stated that at that time he tested his sight and hearing and found both ears and both eyes normal; that he gave McClary the usual detailed physical examination with his clothing removed and that he found *him*

absolutely normal; that he examined his spine and other parts of his body and found no inflammation or disorder of the spine. That he wrote the word "no" in the application in answer to the question: "Have you ever been afflicted with any of the following complaints or diseases? Insanity, apoplexy, palsy or paralysis, vertigo, fits or convulsions, delirium tremens, sunstroke or congestion, inflammation or any other disorder of the spine, brain or nervous system?" and testified that such was his finding and his examination of McClary confirmed such finding, that there was no evidence that he could observe at the time he examined him that led him to believe that McClary had anything wrong with his spine, that McClary had been his patient in 1918 and at that time he did not have arthritis.

Dr. D. J. O'Loughlin testified that on September 13, 1930 he was a regular licensed practicing physician and had been practicing in Kankakee for thirty years specializing in eye, ear, nose and throat, that he examined McClary at that time, diagnosed his trouble as optic atrophy, which he testified is the death of the optic nerve, the nerve of vision to the eye and that he found McClary's condition incurable and permanent. This witness identified his signature to the physician's certificate of September 21, 1930 which accompanied McClary's claim for allowance of a benevolent claim.

Dr. Jesse H. Roth testified on behalf of the plaintiff that he was an eye, ear, nose and throat physician and surgeon practicing his profession in Kankakee since 1916, that he made the acquaintance of McClary on July 23, 1931, at which time he called at his office and he made an examination of him, described the examination made and testified that as a result of his examination he found McClary was blind in his right eye and that this condition was permanent and total. He further testified that the vision of his left eye was 20/60, which meant that his vision in that eye was impaired sixty-six and two-thirds per cent.

absolutely normal; that he attended his eyes and other parts of his body and found no inflammation or disorder of the eyes. That he wrote the word "no" in his application in answer to the question: "Have you ever been afflicted with any of the following diseases or diseases? Insanity, epilepsy, paresis, neuritis, vertigo, fits or convulsions, delirium tremens, drunkenness or intoxication, or any other disease of the eyes, brain or nervous system?" and testified that with his limited and his examination of McCarty continued from 1911, that there was no evidence that he was operative at the time he examined him that led him to believe that McCarty had anything wrong with his eyes, that McCarty had seen his patient in 1911 and at that time he did not know anything. Dr. W. J. Thompson testified that on September 11, 1910 he was a regular licensed practicing physician and had been practicing in Kansas for thirty years specializing in eye, ear, nose and throat, that he examined McCarty at that time, diagnosed his trouble as optic atrophy, when he testified in the Court of the State of Kansas the nerve of vision he saw was that of total blindness's condition irreparable and permanent. This witness identified his signature as the physician's certificate of September 11, 1910 which read: "McCarty's vision for distance is a restoration of sight." Dr. Jesse H. Ross testified on behalf of the plaintiff that he was an eye, ear, nose and throat physician and surgeon practicing his profession in Kansas since 1911, that he made the examination of McCarty on July 22, 1911, at which time he noted that the vision was made an examination of him, described the examination made and testified that as a result of his examination he found McCarty was blind in his right eye and that this condition was permanent and total. He further testified that the vision of his left eye was 20/40, which meant that his vision in each eye was less than normal and two-thirds normal.

On behalf of the defendant Dr. W. P. Cannon testified that he was a practicing physician and had been for twenty-six years, that he knew McClary for fifteen years and that McClary consulted him in November and May of 1928 and in July, 1931 and that he attended him in his last illness and ~~ix~~ also attended him at the time of his death, which occurred on October 14, 1931. This witness further testified that in July, 1931 McClary told him that he, McClary was discharged from the army on account of arthritis of the spine, and that in July, 1931 his examination disclosed that McClary had arthritis at that time. McClary's army discharge was also introduced in evidence showing that McClary was discharged from the army on June 26, 1918 by reason of his physical disability, which was given in his discharge as arthritis of the spine.

The foregoing testimony, together with Sections 59, 60, 64, 68, 69, 70 and 71 of the constitution and general rules of appellant and also the beneficiary certificate, application, premium receipt of July 24, 1931, petition for benevolent claim, declaration of applicant therefor Dr. O'Loughlin's certificate accompanying the same, together with the report of the local lodge approving it and the correspondence, all hereinbefore referred to, constitute the record in this case.

It is first insisted by counsel for appellant that the trial court erred in admitting in evidence the letter of May 7, 1931 from Cary to appellant, the reply of appellant to this letter, Cary's letter of August 1, 1931, the letter of appellant's general counsel of August 4, 1931, the letter of appellant to the secretary of the local lodge dated August 14, 1931, the reply of Cary thereto on August 19, 1931 and the letter to Cary from the general secretary and treasurer of appellant dated August 21, 1931. Counsel state that these letters by Cary, as the agent and representative of McClary, were not material to any issue in the case, that McClary's claim had been definitely rejected by appellant's board of insurance on March 9, 1931 and that these letters of Cary contained many self serving statements made in an effort on the part of McClary to reopen his case, reconsider a past transaction and effect a settlement.

On behalf of the defendant Mr. J. J. ... was a practicing physician and had been for twenty-five years, that he knew McGary for fifteen years and that McGary attended him in October and May of 1931 and in July, 1931 and that on September 14, 1931 his last illness and he also attended him at the time of his death, which occurred on October 14, 1931. This witness further testified that in July, 1931 McGary told him that he, McGary, was diagnosed from the story or account of arthritis of the spine, and that in July, 1931 his examination disclosed that McGary had arthritis of that time. McGary's story or account was also included in evidence from that McGary was diagnosed from the story on June 25, 1931 by reason of his physical disability, which was given in his diagnosis of arthritis of the spine. The foregoing testimony, together with testimony No. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 8

It must be kept in mind that this suit was instituted by plaintiff's intestate in his lifetime to recover under his certificate because he claimed he was permanently disabled within the meaning of Section 68 of Appellant's constitution, general rules and regulations. It is true his claim was first submitted upon blanks furnished by appellant and which designated his claim as a benevolent claim under Sections 70 and 71 of appellant's constitution, but the physical disability therein referred to as shown by the accompanying physician's certificate and his own declaration was complete loss of vision of insured's right eye. It is Section 68 of appellant's constitution and not Section 70 that provides if any member shall suffer complete and permanent loss of the sight of one eye he shall be considered totally and permanently disabled and entitled to receive the full amount of his beneficiary certificate. This claim was rejected by appellant on the ground that total and permanent disability had not been proven. The action of the Board of Insurance of appellant which had final authority in such matters was communicated to the insured under date of March 9, 1931 and this communication advised he who received it to address all further correspondence to the General Secretary and Treasurer. The evidence is that the action of the Brotherhood in rejecting the claim of McClary was re-opened by appellant upon the request of Cary, acting for McClary. By its letter of August 4, 1931 appellant acknowledged the receipt of additional proof of McClary's claim and stated that such additional proof had been referred to the beneficiary board and that McClary would be advised of their action at an early date. Ten days later McClary was advised his claim had been rejected on account of misstatements relative to his vision. McClary was later advised that his certificate was canceled, not on account of his misstatements concerning his vision, but because he had arthritis prior to the time he executed his application for a beneficiary certificate. These letters, in our opinion, disclose that appellant, without objection, treated McClary's claim for total disability as properly presented, passed upon its merits, denied liability and insisted upon

It must be said to which the title was attributed.

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a cancellation of the certificate for the sole reason that the certificate was procured at a time when insured had arthritis and had made in his application therefor a false answer concerning his physical condition. Even though some self serving declarations were embraced within these letters of Cary, we think, considering them as a connected series, they tended to prove the allegations of some of the counts of appellee's amended declaration and that the trial court did not err in admitting them in evidence. All of this correspondence was introduced in evidence upon the first trial and in our ^{first} opinion we said: "It seems clear that the letter of Cary dated August 1, 1931 directed to the Brotherhood and in which he enclosed the army discharge of McClary, and in which he also stated that the condition of his eyesight brought him within Section 68, was properly admitted; including the letter dated August 14, 1931, which canceled McClary's beneficiary certificate, the reply thereto and the letter of August 21, 1931, giving the real reason of the Brotherhood for the cancellation of the certificate. Supreme Lodge K. P. V. Connelly, 185 Ala. 301, 64 So. 362; Union Fraternal League v. Sweeney, 184 Ind. 378, 111. N. E. 305; Fischer v. Supreme Lodge F & L.M. 120 Mo. A. 606, 178 S.W. 269."

It is next insisted that the trial court erred in refusing to instruct the jury at the close of the plaintiff's evidence and at the close of all the evidence to find the issues for the defendant and that appellant's oral motion, at the close of all the evidence, to have plaintiff elect on which counts the case should go to the jury should have been granted. Some of the amended counts two and five averred that proofs of total disability were made on forms furnished by appellant and were made in accordance with defendant's constitution, regulations and general rules. The evidence did not sustain these allegations but the record discloses that during the course of the trial, counsel for appellee stated that they did not contend that there was formal proof of total disability, but that there was a waiver and the motion of appellant at the close of plaintiff's case and

also at the close of all the evidence was a general motion only to instruct the jury to return a verdict for the defendant and applied to all the counts of the declaration and the court in each instance reserved its ruling and permitted the case to go to the jury. In the record in this condition, we do not believe appellant was prejudiced by the rulings of the trial court.

It is finally insisted that the trial court erred in giving to the jury at the request of the plaintiff the first, fifth and sixth instructions. The first instruction told the jury "that the plaintiff is seeking to recover in this case the amount of the beneficiary certificate and interest thereon and alleges that McClary, the claimant, paid his dues regularly; that he became totally and permanently disabled and that proof of such disability was made on the forms supplied by the defendant and also by means of a letter from C. D. Cary to the defendant and that this claim was denied by defendant because of false statements made by McClary in his application concerning his vision and because he had arthritis before making application of which he made no mention and because he was not totally and permanently disabled. The defendant pleads the general denial and special pleas that proof of disability was not made within the time and in the manner required by the certificate; that the suit is barred by the statute of limitations; and that McClary made misrepresentations and false statements in his application; and that he did not file claim for disability in accordance with the certificate."

The fifth instruction is as follows: "The Court instructs you that the plaintiff alleges that the defendant waived compliance with the terms of the certificate as to the time and manner of making proof of total and permanent disability. If you find from the evidence under the instructions of the Court that proof of total and permanent disability was delivered to the defendant, and that said defendant failed to make objection to the manner or form or time of such proof, then by its failure to make objection to same, said defendant may not afterward question its sufficiency."

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in accordance with the certificate.

[illegible]

The sixth instruction follows: "The court instructs you that under the pleadings in this case one of the defenses of the defendant is that Amel W. McClary did not make proof of his disability in accordance with defendant's constitution and by-laws but you are instructed that if you believe from the evidence that the attorney for McClary made demand on defendant for the payment for McClary's disability and defendant refused to pay on any grounds other than proof of said disability was not made according to defendant's constitution and by-laws, then defendant waived proof of said disability according to its constitution and by-laws and plaintiff was thus excused from making said proof according to said Constitution and By-Laws."

The criticism of these instructions is that the first one did not inform the jury of the date upon which it is claimed the alleged disability occurred, that it in effect told the jury to determine whether a letter from plaintiff's lawyer to defendant's general counsel may be substituted for the principal requirements of the contract with reference to the service of notice and demand, and failed to tell the jury that the defendant's pleas set forth that the plaintiff was not entitled to recover for the reason that he had not filed his demand or notice of disability within six months thereof and that the contract of the parties required such notice. Counsel for appellant further insist that the fifth and sixth instructions inform the jury that if plaintiff's lawyer wrote a letter to defendant demanding payment without any proof of disability and the defendant failed to make certain objections, that then the plaintiff was excused from making proof of disability and that both of these instructions ignore the question of time and submits a question of law to the jury. Counsel further insist that the court also erred in modifying defendant's first instruction. As tendered, this instruction was as follows: "The court instructs the jury that under the contract of insurance in this case it is agreed between the insured, Amel W. McClary, and the defendant that all right of action upon the beneficial certificate shall be absolutely barred unless proofs of total and permanent disability

shall be forwarded to the general secretary and treasurer of defendant within six months after such disability occurs. You are further instructed that if you believe from the evidence that the said Amel W. McClary became totally blind in the right eye more than six months previous to the date when this suit was started, on September 25, 1931, and that he did not make proof of such disability in accordance with the provisions of Section 69 of defendant's constitution within six months thereafter, the plaintiff cannot recover." The Court gave this instruction after adding thereto: "Unless the time for making such proofs was waived by defendant as defined in these instructions."

In this connection counsel argue that there is no dispute as to the writing of the letters by Cary on behalf of McClary to appellant and there is no contention that appellant did not reply and act as evidenced by its ~~very~~ several communications introduced in evidence, that what constitutes waiver is a question of law and that instead of submitting an issue to the jury as to waiver, the court should have held as a matter of law that these communications did not constitute waiver. The authorities hold that what facts will constitute a waiver is a matter of law but whether the facts exist in any given case is a question of fact. Aetna Life Ins. Co. v. Sanford, 200 Ill. 126; Old Colony Life Ins. Co. v. Hickman 315 Ill. 304. The evidence in this record is that McClary did file a claim with defendant for payment under his certificate for a total disability and an examination of the claim disclosed the disability claimed was for loss of vision in one eye. This claim was made on forms which stated it was a benevolent claim but the statements therein, the declaration of the claimant and the accompanying physician's certificate disclosed its true character. Appellant may have treated it as a benevolent claim and rejected it. Thereafter the claim was reopened and appellant was advised that the facts brought McClary under Section 68. Appellant made no objections to the time, form or manner in which the claim was presented, but, by its proper officers,

passed upon and rejected the claim not because proof thereof was not submitted within a given time or in accordance with its constitution, rules and regulations or that McClary was not permanently and completely disabled, but because it found from those proofs that McClary had arthritis of the spine when the certificate was issued and secured the issuance of the certificate by falsely stating that he did not have such physical disability at that time. Under the conceded facts as they appear in this record, we do not think appellant's cause was prejudiced by the giving of these instructions tendered by the plaintiff or by the modification of the first instruction tendered by the defendant.

Appellant is entitled to a fair trial and a record free of reversible error, but aside from the time, manner and form in which McClary's claim was presented to it, the controverted material questions of fact made by the pleadings and submitted to the jury were whether McClary had become permanently disabled within the meaning of the provisions of the certificate and whether he had procured the issuance of the certificate by falsely stating that at the time he applied therefor he did not have any physical disability. No complaint is made by appellant of the court's instructions upon these issues.

McClary accepted the certificate June, 1919, paid the monthly dues regularly for twelve years and two months. Three trial courts have approved three verdicts finding that the plaintiff was entitled to recover and the judgment in the instant case, in our opinion, is sustained by the evidence. The object of the review of judgments of trial courts, as stated frequently in reported opinions of our Supreme and Appellate Courts is not to determine whether the record is free from all error, but is to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, after a trial in which no error has occurred which might be prejudicial to defendant's rights. This litigation should terminate and the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

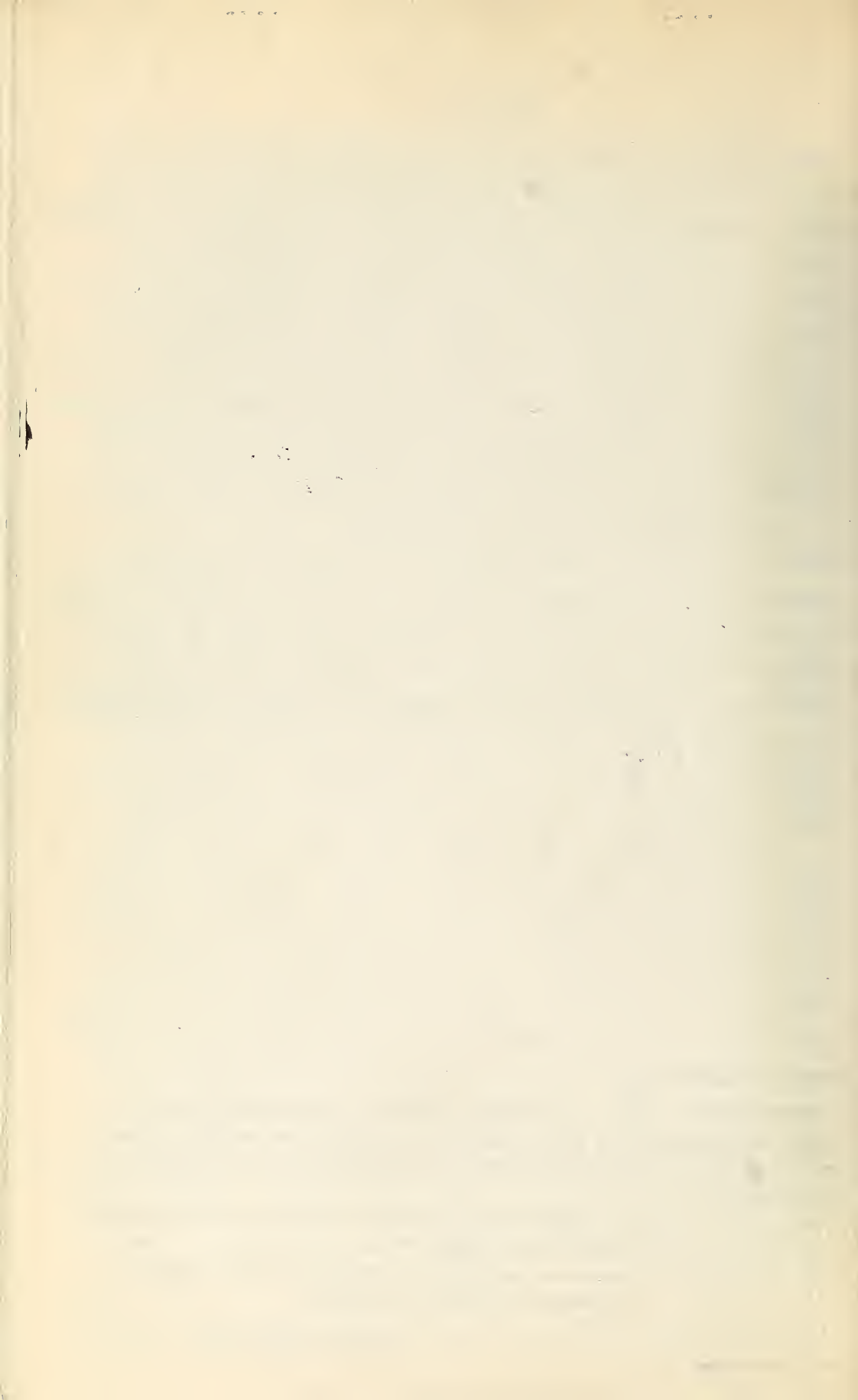
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STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,
 Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
 year of our Lord one thousand nine hundred and thirty-seven,
 within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 621⁴

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 9 1937 the opinion of the Court was filed in the Clerk's
 Office of said Court, in the words and figures following, to-wit:

172 43482

THE
LIBRARY OF THE
BOSTON PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
172 43482

In the Appellate Court of Illinois

Second District

May Term, A. D. 1937

Frank L. Firman, Administrator of
the Estate of Frank P. Firman,
deceased,

Appellee,

vs.

Appeal from the Circuit Court

of Rock Island County

Julius Duyvejonck, Rene Duyvejonck
and Gustav Christians,

Appellants,

DOVE-J.

The first count of the complaint in this case alleged that Julius and Rene Duyvejonck were, on December 16, 1934, the owners of a motor truck then being driven by their servant and employee, Gustav Christians, in a westerly direction on Fifth Avenue in the City of Rock Island, at or near its intersection with Forty-fourth Street, a designated preferential public highway with stop signs on each side thereof, which required vehicles traveling Fifth Avenue and about to enter or cross Forty-fourth Street to come to a full stop. It was then alleged that plaintiff's intestate, upon the occasion in question, was on the west cross walk of said Forty-fourth Street on the curb of Fifth Avenue proceeding with due care and caution for his own safety in a southerly direction upon and along said crossing, that defendants negligently operated their truck and through their improper conduct, said truck struck plaintiff's intestate and as a result thereof he died. The second count contains substantially the same allegations, but in addition alleges that the said truck of the defendants Julius and Rene Duyvejonck, upon the occasion in question, was being driven, by their servant, at a speed in excess of forty miles per hour through a residential district of Rock Island, which was at a speed

In the Appellate Court of Illinois

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Frank L. Firman, Administrator of
the Estate of Frank P. Firman,
deceased,

Appellee,

appeal from the Circuit Court

vs.

of Cook Island County

Julius Dwyvetonck, Rene Dwyvetonck
and Gustav Christians,

Appellants,

DOVE-1.

The first count of the complaint in this case alleged that Julius and Rene Dwyvetonck were, on December 15, 1934, the owners of a motor truck then being driven by their servant and employee, Gustav Christians, in a westerly direction on Fifth Avenue in the City of Rock Island, at or near its intersection with Forty-fourth Street, a designated preferential public highway with stop signs on each side thereof, which required vehicles traveling Fifth Avenue and about to enter or cross Forty-fourth Street to come to a full stop. It was then alleged that plaintiff's intestate, upon the occasion in question, was on the west crosswalk of said Forty-fourth Street on the curb of Fifth Avenue proceeding with due care and caution for his own safety in a southerly direction across said crossing, that defendant negligently operated their truck and through their improper conduct, said truck struck plaintiff's intestate and as a result thereof he died. The second count contained substantially the same allegations, but in addition alleges that the said truck of the defendant Julius and Rene Dwyvetonck, upon the occasion in question, was being driven by their servant, at a speed in excess of forty miles per hour through a residential district of Rock Island, which was at a speed

greater than was then and there reasonable and proper, having regard to the traffic and use of the way. The defendants answered denying that Julius ^{and} Rene Duyvejonck were the owners of the truck and alleged that it was then being used in the business of Rene and was operated by defendant Christians; an employee of Rene. In their answer the defendants denied that plaintiff's intestate, at the time and place in question, was on the curb of Fifth Avenue, but averred that he was crossing said highway at a point approximately one hundred feet west of Forty-fourth Street; that he was not exercising due care for his own safety, but stepped off of the north curb of Fifth Avenue immediately in front of the truck which was proceeding westerly at approximately ten miles per hour. It was further averred that the death of the decedent was not the result of any negligence upon the part of the defendants, but was an unavoidable accident.

Upon the trial, two special interrogatories were submitted to the jury as follows:- "Was the defendant Gustav Christians guilty of negligence in the operation of the truck on the night in question as alleged in plaintiff's declaration", and "At the time of the accident, as alleged in the declaration, was the driver of the truck, Gustav Christians, the servant and employee of Julius Duyvejonck?" The jury answered both of these interrogatories in the affirmative and returned a general verdict finding all defendants guilty and assessing plaintiff's damages at \$2500.00. Upon these findings judgment was rendered and the record is before us for review.

It is insisted by counsel for appellants that the evidence is insufficient to support the judgment, that the trial court admitted, over appellant's objections, improper evidence, that there is no competent evidence in the record that Gustav Christians, the driver of the truck, was the servant, agent or employee of Julius Duyvejonck and finally, that the court erred in giving each and every instruction requested by the plaintiff. Counsel for appellee insist that inasmuch as the record discloses that appellants

travelling then was then and there reasonably and proper, having re-
gard to the traffic and use of the way. The defendants answered
denying that Julius Rene Dayvejonck was the owner of the
truck and alleged that it was then being used in the business of
Rene and was operated by defendant Christian, an employee of Rene.
In their answer the defendants denied that plaintiff's interest,
at the time and place in question, was on the curb of Fifth Avenue,
but averred that he was crossing said highway at a point approximately
one hundred feet west of Forty-fourth Street; that he was not exercising
due care for his own safety, but stepped off of the north curb of
Fifth Avenue immediately in front of the truck which was proceeding
westerly at approximately ten miles per hour. It was further averred
that the fault of the accident was not the result of any negligence
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accident, as alleged in the declaration, was the driver of the truck,
Gustav Christians, the servant and employee of Julius Dayvejonck?"
The jury answered both of these interrogatories in the affirmative
and returned a general verdict finding defendant guilty and
assessing plaintiff's damages at \$200.00. Upon these findings
judgment was rendered and the record is before us for review.
It is insisted by counsel for appellants that the evidence
is insufficient to support the judgment, that the trial court
admitted, over appellant's objection, improper evidence, that
there is no competent evidence in the record that Gustav Christians,
the driver of the truck, was the servant, agent or employee of
Julius Dayvejonck and finally, that the court erred in giving each
and every instruction requested by the plaintiff. Counsel for
appellants insist that inasmuch as the record discloses that appellants

made no motion to set aside the special findings of the jury, they are foreclosed from here contending that there is no sufficient evidence upon which to base those special findings and therefore the only questions open for consideration by this court are whether the evidence discloses that plaintiff's intestate was free from contributory negligence and whether improper instructions were given the jury on behalf of the plaintiff.

In the instant case the record discloses that the jury returned its verdict on October 22, 1936; that on November 16, 1936 judgment was entered thereon; that appellants entered their motion to set aside this judgment, also their motion for a new trial and their motion for judgment notwithstanding the verdict. The motion to set aside the judgment was allowed, all other motions were denied and on December 7, 1936, the court again rendered the judgment from which this appeal is prosecuted.

In *Brimie v. Belden Mfg. Co.*, 287 Ill. 11, the court held that a defendant is conclusively bound by a special finding of fact unless error has been assigned thereon and the question has also been raised on a motion for a new trial. In the course of its opinion, the court said: "No motion was made by plaintiff in error to set aside this special finding of fact in the trial court, nor was any error assigned thereon, either in the Appellate Court or this court. It is, however, contended here that the question was preserved by motion made by plaintiff in error in the trial court requesting that court to direct a verdict for plaintiff in error, and was also preserved in the motion for new trial by the general objection that the verdict was contrary to the weight of the evidence. Under the rulings of this court, neither of these points can be sustained." So, in the instant case, no motion was made in the trial court to set aside these special findings and in none of the several motions made by the defendants after the verdicts were returned was there any reference made to the special findings except

made no motion to set aside the special findings of the jury, they are foreclosed from now contending that there is no sufficient evidence upon which to base those special findings and therefore the only questions open for consideration by this court are whether the evidence disclosed that plaintiff's instructions were contributory negligence and whether improper instructions were given the jury on behalf of the plaintiff.

In the instant case the record discloses that the jury returned its verdict on October 22, 1936; that on November 10, 1936 judgment was entered thereon; that appellants entered their motion to set aside this judgment, also their motion for a new trial and their motion for judgment notwithstanding the verdict. The motion to set aside the judgment was allowed, all other motions were denied and on December 7, 1936, the court again rendered the judgment from which this appeal is prosecuted.

In *Brink v. Reiden Wfg. Co.*, 237 Ill. 11, the court held that a defendant is conclusively bound by a special finding of fact unless error has been assigned thereon and the question has also been raised on a motion for a new trial. In the course of its opinion, the court said: "no motion was made by plaintiff in error to set aside this special finding of fact in the trial court, nor was any error assigned thereon, either in the Appellate Court or this court. It is, however, contended here that the question was preserved by motion made by plaintiff in error in the trial court requesting that court to direct a verdict for plaintiff in error, and was also preserved in the motion for new trial by the general objection that the verdict was contrary to the weight of the evidence. Under the rulings of this court, neither of these points can be sustained." So, in the instant case, no motion was made in the trial court to set aside these special findings and in none of the several motions made by the defendants after the verdict were returned was there any reference made to the special findings except

in the motion for judgment non obstante it was stated that the finding as to agency is inconsistent with the general verdict.

Counsel for appellants, in their reply brief, say that the rule announced in *Brimie v. Belden Mfg. Co.*, supra, and the cases therein cited and in *Taake v. Eichhorst*, 344 Ill. 508 and *Jacobs v. Ill. Terminal Co.*, 262 Ill. App. 481, being the several cases relied upon by appellee is obsolete, that all these cases were decided prior to the adoption of the Civil Practice Act and should not now be followed. Section 79 of the Practice Act of 1907 provided that in any case in which the jury may render a general verdict, they may be required by the court and must be so required on request of any party to the action to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury. Section 65 of the present Civil Practice Act is to the same effect. Appellants not having made any motion in the trial court to set aside the special findings of the jury and no question as to them having been raised in defendants' motion for a new trial, we are of the opinion that in this state of the record appellants are in no position to insist that appellant, Christians, was not guilty of the negligence charged or that he was not the servant and employee of appellant Julius Duyvejonck.

Counsel for appellants insist that the evidence is insufficient to support the judgment and particularly that there is no competent evidence in the record to support the special finding that Christians, the driver of the truck, was the servant, agent or employee of appellant, Julius Duyvekonck. We have read the evidence as abstracted. It discloses that on the evening of December 16, 1934 between 9:00 and 9:30 o'clock, Christians was driving a one ton Dodge, panel body, closed truck, loaded with three or four halfbarrels of beer, on the north side of Fifth Avenue in

in the motion for judgment non obstante it was stated that the finding as to agency is inconsistent with the factual verdict. Counsel for appellants, in their reply brief, say that the rule announced in *Smith v. Jones*, 100 Ill. 2d 100, 200, and the cases therein cited and in *Teague v. Nicholas*, 344 Ill. 600 and *Jacobs v. Ill. Terminal Co.*, 352 Ill. 481, being the general cases relied upon by appellees is obsolete, that all these cases were decided prior to the adoption of the Civil Practice Act and should not now be followed. Section 79 of the Practice Act of 1907 provides that in any case in which the jury may render a general verdict, they may be required by the court and may be so required on request of any party to the action to find specially upon any material question or questions of fact which shall be stated to them in writing, which question of fact shall be submitted by the party requesting the same to the adverse party before the commencement of the argument to the jury. Section 85 of the present Civil Practice Act is to the same effect. Appellants not having made any motion in the trial court to set aside the special findings the jury and no question as to them having been raised in appellant's motion for a new trial, we are of the opinion that in this state of the record appellants are in no position to demand that appellant Christians, was not guilty of the negligence charged or that he was not the servant and employee of appellant Illinois Industrial. Counsel for appellants insist that the verdict is inconsistent to support the judgment and notwithstanding that there is competent evidence in the record to support the special finding that Christians, the driver of the truck, was the servant, agent or employee of appellant, Julius Duvyakonok. We have read the evidence as presented. It disclosed that on the evening of December 12, 1934 between 9:00 and 9:30 o'clock, Christians was driving a one ton Dodge, panel body, closed truck, loaded with three or four barrels of beer, on the north side of Fifth Avenue in

Rock Island.

Reckford. He was proceeding in a westerly direction and as he approached Forty-fourth Street, he stopped on the east side thereof. His testimony is that he then started his truck in low gear and had proceeded to about the middle of the intersection when he first observed plaintiff's intestate, who was then about forty or fifty feet west of the Forty-fourth Street intersection on the north side of Fifth Avenue, and was just about to step off of the curb and enter Fifth Avenue; that he, Christians, observed him as he stepped off of the curb and observed that he proceeded as far as the middle of the street. Christian further testified that he then noticed that plaintiff's intestate retraced his steps and went back north. At one place in his testimony Christians said he ~~didn't~~ didn't see plaintiff's intestate any more after he reached the middle of the street until he fell under the wheels of his truck. At another place in his testimony, he said that he observed plaintiff's intestate not only as he started back north, but that he saw him at the moment the left-hand bumper of his truck hit him. Again this witness testified: "I don't believe I saw Firman (the deceased) before I hit him. I heard a thud, some noise, and ~~that~~ that is how I knew I hit him". This witness further testified that at the time he struck plaintiff's intestate he was driving his truck on the north side of the pavement between ten and fifteen miles per hour, that his brakes were good, his lights burning and that he stopped within fifteen feet after striking plaintiff's intestate. Whether Christians was intoxicated at the time of the accident is a disputed question of fact. Louis Van Acker testified that about 9:00 o'clock in the evening of the accident, Christians left his tavern so drunk that he, Van Acker, refused to sell him any more intoxicating liquor.

Francis Orville Black testified that he lived on the south side of Fifth Avenue in the third house west of forty-fourth Street; that he went to the place where the body of the deceased was lying

Robert J. ...

He was proceeding in a westerly direction and as he approached Forty-fourth Street, he stopped on the east side thereof. His testimony is that he then started his truck in low gear and had proceeded to about the middle of the intersection when he first observed plaintiff's intestate, who was then about forty or fifty feet west of the Forty-fourth Street intersection on the north side of Fifth Avenue, and was just about to step off of the curb and enter Fifth Avenue; that he, Christian, observed him as he stepped off of the curb and observed that he proceeded as far as the middle of the street. Christian further testified that he then noticed that plaintiff's intestate retraced his steps and went back north. At one place in his testimony Christian said he didn't see plaintiff's intestate any more after he reached the middle of the street until he fell under the wheels of his truck. At another place in his testimony, he said that he observed plaintiff's intestate not only as he started back north, but that he saw him at the moment the left-hand bumper of his truck hit him. He also testified: "I don't believe I saw him" (the deceased) before I hit him. I heard a loud, some noise, and that is how I knew I hit him". This witness further testified that at the time he struck plaintiff's intestate he was driving his truck on the north side of the pavement between ten and fifteen miles per hour, that his brakes were good, his lights were on, and that he stopped within fifteen feet after striking plaintiff's intestate. Whether Christian was intoxicated at the time of the accident is a disputed question of fact. Louis Van Lier testified that about 8:00 o'clock in the evening of the accident, Christians left his tavern to drink but he, Van Lier, refused to sell him any more intoxicating liquor. Francis Orville Black testified that he lived on the south side of Fifth Avenue in the third house west of forty-fourth Street; that he went to the place where the body of the deceased was lying

shortly after the accident and found ^{his} body lying in Fifth Avenue, seventy feet west of the west line of the Forty-fourth Street intersection, his head being within a foot of the south curb. This witness further testified that Christians' truck was then parked in Fifth Avenue, eighty feet farther west and that tire or truck marks were noticed on the pavement, extending one hundred feet east from the rear wheels of the truck. Henry Biscontine corroborated Black as to the position of the body and the truck after the accident.

The son and administrator of the deceased testified that some six or eight weeks after the accident he called at the tavern of appellant, Julius Duyvejonck, and while there and engaged in conversation with him, Christians entered Duyvejonck's place of business and Julius Duyvejonck then said to the witness: "There is the driver of my truck that struck your dad". Upon cross examination this witness stated that what he understood Julius to say in this conversation was that Christians was the driver of the truck which hit his father, but upon re-direct examination he reiterated the conversation that he had testified to in chief.

The evidence is further that Fifth Avenue, including the Forty-fourth Street intersection, is paved with brick having a tar filler; that Fifty Avenue was twenty-four feet in width between the roadway facings and Forty-fourth Street was thirty feet between curbs. It further appears that an arc light was burning at the intersection of Fifth Avenue and Forty-fourth Street upon the night in question; that the evening was chilly and the pavement dry and clean.

It further appears from the evidence that for a year and a half before the accident, plaintiff's intestate had made his home at the Francis Orville Black residence, occupying the upstairs thereof; that at the time of his death he was about five feet ten inches in height, weighed approximately two hundred pounds, was a carpenter by trade, and also assisted his son in the grocery

his

shortly after the accident and found body lying in Fifth Avenue, seventy feet west of the west line of the Forty-fourth Street intersection, his head being within a foot of the south curb. This witness further testified that "mistakenly" truck was then parked in Fifth Avenue, eighty feet north of west and that tire or truck marks were noticed on the pavement, extending one hundred feet east from the rear wheels of the truck. Henry Biscontino corroborated Black as to the position of the body and the truck after the accident.

The son and administrator of the deceased testified that some six or eight weeks after the accident he called at the tavern of appellant, Julius Weyvejont, and while there and engaged in conversation with him, Christman ascertained Weyvejont's place of business and Julius Weyvejont then said to the witness: "There is the driver of my truck that struck your dad". Upon cross examination this witness stated that what he understood Julius to say in this conversation was that Christman was the driver of the truck which hit his father, but upon re-direct examination he reiterated the conversation that he had testified to in chief.

The evidence is further that Fifth Avenue, involving the Forty-fourth Street intersection, is paved with brick having a tar filler; that Fifth Avenue was twenty-four feet in width between the roadway leading to Forty-fourth Street and thirty feet between curbs. It further appears that at the time and place and during the night intersection of Fifth Avenue and Forty-fourth Street upon the night in question; that the evidence was called to the attention of jury and shown.

It further appears from the evidence that for a year and a half before the accident, plaintiff's father had made his home at the Francis Orville Black residence, occupying the residence thereof; that at the time of his death he was about five feet ten inches in height, weighed approximately two hundred pounds, was a carpenter by trade, and also assisted his son in the grocery

business. Upon the evening in question, plaintiff's intestate had been at Martin's Tavern, leaving there about eight o'clock. Shortly thereafter he stopped at Myers' Tavern, played a game of Euchre and left about 9:15, having had one glass of beer. The evidence is that he was sober when he left the Myers Tavern and that his home was only a short distance away. There is also evidence to the effect that he was not required to wear glasses except for reading and while several witnesses testified that both his hearing and eyesight were good, others testified that he was hard of hearing. The witness Black assisted in removing plaintiff's intestate into his, Black's home, from whence it was taken to the Lutheran Hospital, where he died early the following morning, never having regained consciousness.

Lawrence Asa testified on behalf of the defendants to the effect that he was standing at the northwest corner of Forty-fourth Street and Fifth Avenue in front of Winchell's Tavern at about 9:45 o'clock on the night in question. That he saw Christians approach the Forty-fourth Street intersection, driving a truck; that he stopped at the intersection and then proceeded at about ten miles per hour across the intersection and into Fifth Avenue and was driving within three feet of the north curbing. That this witness observed that Christians stopped again sixty or seventy feet west of the intersection. That the witness then saw Christians get out of the truck and run to a house on the corner. This witness further testified that he knew plaintiff's intestate and that he was hard of hearing. Upon rebuttal the plaintiff testified to two conversations he had had with the witness, one a few days after the accident and the other a few days before the trial, in which Asa said he didn't see the accident and didn't know anything about it except he saw the truck pull up to the stop sign and stop.

Mrs. Pearl Howe testified that on the evening in question she was living on the southeast corner of the intersection of Fifth

business. Upon the evening in question, plaintiff's intestate had been at Martin's Tavern, leaving there about eight o'clock. Shortly thereafter he stopped at Myers' Tavern, played a game of dominoes and left about 9:15, having had one glass of beer. The evidence is that he was sober when he left the Myers Tavern and that his home was only a short distance away. There is also evidence to the effect that he was not required to wear glasses except for reading and while several witnesses testified that both his hearing and eyesight were good, others testified that he was hard of hearing. The witness Black assisted in removing plaintiff's intestate into his, Black's home, from whence it was taken to the Lutheran Hospital, where he died early the following morning, never having regained consciousness.

Lawrence Lee testified on behalf of the defendant as to the effect that he was standing at the northwest corner of Forty-fourth Street and 5th Avenue in front of Mitchell's Tavern at about 9:45 o'clock on the night in question. That he saw Christians approach the Forty-fourth Street intersection, driving a truck; that he stopped at the intersection and then proceeded at about ten miles per hour across the intersection and into Fifth Avenue and was driving within three feet of the north curb. That this witness observed the Christian stop at about six or seven feet west of the intersection. That the witness then saw Christian get out of the truck and run to a window on the corner. This witness further testified that he knew plaintiff's intestate and that he was hard of hearing. Upon repeated questioning he testified that two conversations he had had with the witness, one a few days after the accident and the other a few days before the trial, in which Lee said he didn't see the accident and didn't know anything about it except he saw the truck pull up to the stop sign and stop. Mrs. Pearl Howe testified that on the evening in question she was living on the southeast corner of the intersection of Fifth

Avenue and Forty-fourth Street. That between 9:30 and 9:45 o'clock some friends were leaving her home and she accompanied them to the sidewalk and then came back to her porch. That she observed the truck Christians was driving stop immediately in front of her house on the north side of Fifth Avenue. That a car was going north on Forty-fourth Street and after it had cleared the intersection, Christians started his car and that he hardly had time to get across the intersection when she heard a bump and heard the driver of the truck call for help, stating that he had hit a man. That the truck stopped about seventy-five feet west of the west line of the intersection and that as it crossed the intersection and proceeded west, it was traveling about ten or twelve miles per hour. That she and her husband were the first ones to arrive at the place where the body of plaintiff's intestate lay and that the truck, when they arrived there, was about ten feet from the body, headed west and only two or three feet from the north curb of Fifth Avenue. She stated she observed Christians that night after the accident and as he went into Mrs. Black's, where the body of plaintiff's intestate had been taken, and that he walked as any other man did, but was excited. Fred Howe, the husband of this witness, testified that he didn't observe the truck after it stopped at the intersection and as it proceeded west, but that when he heard the bump he rushed to the porch and saw the truck, which was then seventy-five feet west of the west line of Forty-fourth Street; that he then went down the street to the place of the accident and when he arrived there Christians was out of his truck trying to stop the traffic. That Christians then got back in his truck and moved it about thirty feet west and two and one-half or three feet north toward the curb. This witness further testified that Christians was sober after the accident but excited.

Julius Duyvejonck testified in his own behalf that he owned and operated a bar room but had no financial interest in the wholesale liquor business of which his son Rene was the sole operator and

avenue and Forty-fourth Street. Just between 8:30 and 8:45 o'clock some friends were leaving her home and she accompanied them to the sidewalk and then came back to her porch. Just then she observed the truck Christmas was driving stop immediately in front of her house on the north side of Fifth Avenue. Just a car was coming north on Forty-fourth Street and after it had cleared the intersection, Christmas started his car and that he hardly had time to get across the intersection when she heard a bump and heard the driver of the truck call for help, stating that he had hit a man. The car then stopped about twenty-five feet west of the west line of the intersection and that as it passed the intersection and proceeded west, it was traveling about ten or twelve miles per hour. That she and her husband were the first ones to arrive at the place where the body of plaintiff's intestate lay and that the truck, when they arrived there, was about ten feet from the body, headed west and only two or three feet from the north curb of Fifth Avenue. She stated she observed Christmas just after the accident and as he went into Mrs. Black's, where the body of plaintiff's intestate had been taken, and that he walked as any other man did, but was excited. Therefore, the husband of this witness, testified that he didn't observe the truck after it stopped at the intersection and as it proceeded west, but that when he heard the bump he rushed to the porch and saw the truck, which was then twenty-five feet west of the west line of Forty-fourth Street, that it then went down the street to the place of the accident and when he arrived there Christmas was out of his truck trying to reach the victim. That Christmas then got back in his truck and moved it about thirty feet west and two and one-half or three feet north toward the curb. This witness further testified that Christmas was rather sober the accident but excited.

Julius Levy, broker testified in his own behalf that he owned and operated a bar room but had no financial interest in the whole sale liquor business of which his son Gene was the sole proprietor and

owner. That his bar room and Rene's wholesale business were conducted from the same premises, but his bar room was in front and the wholesale house in the rear. That Christians helped him formerly but since Rene started to operate the wholesale business he, Julius, had not paid him any wages or salary. This witness further testified that he, Julius, purchased the truck but gave it to his son. On cross-examination he said he didn't remember whether the state automobile license for the truck for 1934 was issued to him or not. That between the wholesale house and his bar room, there were three doors and that they go back and forth from one place to another a good deal, that he didn't have sufficient education to take wholesale liquor orders and never helped put up orders and the only thing he did was to go down to the brewery and get a truck load of beer for Rene.

Rene Duyvejonck testified that he was a son of Julius and that he started to operate a wholesale liquor house soon after beer was legalized and that he had a federal license to operate a wholesale house in 1934, that his father had a truck and hauled beer for him from the brewery but that he, Rene, paid him for so doing. That Christians was in his employ and working for him on the night of December 16, 1934 and had been for some time previous. Upon cross examination he stated that the ownership and license of the truck were in his father's name, that his father gave him the bulk of the money to start up in the wholesale business and that after his father purchased the truck, he turned it over to him to use and he had used it continuously in his business.

The record discloses that north of Fifth Avenue and running parallel with it are railroad tracks and a single wire fence runs along the south side of the right of way west of the intersection at Forty-fourth Street; that no houses are located on the north side of Fifth Avenue and in order for plaintiff's intestate to reach his home from the Meyers Tavern, it was necessary for him to cross the railroad right of way from north to south and then to cross over

owner. That his bar room and the whole place was in front and the
from the same premises, but his bar room was in front and the
whole place was in front and the whole place was in front and the
but since he started to operate the whole place was in front and the
Julius, had not paid him any wages or salary. This witness further
testified that he, Julius, purchased the truck for 1934 and gave it to his
son. On cross-examination he said he didn't remember whether the
state automobile license for the truck for 1934 was issued to him
or not. That between the whole place house and his bar room, there
were three doors and that they go back and forth from one place to
another a good deal, that he didn't have sufficient education to
take whole place liquor orders and never helped put up orders and the
only thing he did was to go down to the brewery and get a truck
load of beer for sale.

He also testified that he was a son of Julius and
that he started to operate a whole place liquor house soon after 1934
was legalized and that he had a federal license to operate a whole-
sale house in 1934, that his father had a truck and handled beer for
him from the brewery but that he, Julius, said he was not doing.
That Christians was in his employ and working for him on the night
of December 16, 1934 and had beer for sale the previous. Upon
cross examination he stated that the ownership and license of the
truck were in his father's name, that his father was his sole
of the money to start up in the whole place business and that after
his father purchased the truck, he turned it over to him to use
and he had used it continuously in his business.

The record disclosed that north of Fifth Avenue and running
parallel with it are railroad tracks and a whole place house
along the south side of the right of way west of the intersection
at Fort-South Street; that no houses are located on the north side
of Fifth Avenue and in order for plaintiff's interest to reach his
home from the Levee Avenue, it was necessary for him to cross the
railroad right of way from north to south and then to cross over

Fifth Avenue. The evidence is that the left front fender of the truck struck him and his body was found with his head only a couple of feet from the south curb, which indicates that he had advanced a considerable distance across Fifth Avenue at the time he was struck. The question whether plaintiff's intestate was guilty of contributory negligence was a question of fact to be passed upon by the jury and while, as said in C. C. C. & St. I. Ry. Co. v. Keenan, 190 Ill. 217, at page 219, the burden of proof was upon plaintiff to show that his intestate was in the exercise of due care for his own safety, it did not devolve upon him to establish such due care by direct and positive testimony, but such due care might be inferred from all the circumstances shown to exist immediately prior ~~to~~ to and at the time of the injury, and in determining such question, the jury might properly take into consideration the instincts prompting to the preservation of life and the avoidance of danger.

The question whether Christians, the driver of the truck, was the agent, servant and employee of Julius Duyvejonck was also a question of fact to be passed upon by the jury. The evidence tends to prove that Julius Duybejonck bought this truck; that he procured a license for it in his own name in 1934 and never had it transferred to anyone else, that he, Julius, stated that it was his truck driver who was driving the truck which killed plaintiff's intestate and that on the night in question Christians was driving a truck for Julius. It also appears from the evidence that Julius and his son Rene were both engaged in the liquor business; that their businesses were conducted in the same building, with doors between, each having access to the portion thereof which they testified the other conducted. It is also to be noted that after the accident, Christians reported the same to Julius. Inasmuch, however, as the judgment must be reversed because of erroneous instructions, it was not necessary for us to pass upon the weight of the evidence.

resistant for us to pass upon the weight of the evidence.

It is finally insisted that the trial court erred in giving to the jury each of the five instructions tendered by appellee. These instructions are:

"1. The Court instructs the jury that the only care and caution required of the plaintiff was such conduct and care and caution for his safety as a reasonably prudent and cautious person would have exercised under the same or like conditions or circumstances, which surrounded the plaintiff before and at the time of the injury. The plaintiff was not required to exercise extraordinary care or diligence.

"2. The Court instructs the jury that if you believe from a preponderance of the evidence that the defendants are guilty as charged in the plaintiff's complaint, then, in determining the amount of damages, if any, to be awarded to the plaintiff as administrator, you should fix such amount for your verdict as will, in your judgment, from all the evidence, be a fair and just compensation to the next of kin of the decedent for the pecuniary loss, if any, resulting to him by reason of his death.

"3. The Court instructs the jury that you are to take into account in weighing the testimony of any witness his interest or want of interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence. You have a right to believe all the testimony of a witness, or believe it in part and disbelieve it in part, or you may reject it altogether, as you may find the evidence to be. You are to believe as jurors what you would believe as men, and there is no rule or laws which requires you to believe as jurors what you would not believe as men.

"4. The Court instructs the jury that negligence is the omission to do something which a reasonable man, guided by the

It is finally insisted that the trial court acted in giving to the jury each of the five instructions tendered by applicant.

These instructions are:

"1. The Court instructs the jury that the only cause and occasion required of the plaintiff was such conduct and such occasion for his action as a reasonably prudent and cautious person would have exercised under the same or like conditions or circumstances, which surrounded the plaintiff before and at the time of the injury. The plaintiff was not required to exercise extraordinary care or diligence.

"2. The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant was guilty of negligence in the plaintiff's complaint, then, in determining the amount of damages, if any, to be awarded to the plaintiff as administrator, you should fix such amount for your verdict as will, in your judgment, from all the evidence, be a fair and just compensation to the next of kin of the deceased for the pecuniary loss, if any, resulting to him by reason of his death.

"3. The Court instructs the jury that you are to take into account in weighing the testimony of any witness his interest or interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, whether he is supposed to be contradicted by the facts and circumstances in the case as shown by the evidence. You have a right to believe all the testimony of a witness, or believe it in part and disbelieve it in part, or you may reject it altogether, as you may find the defendant to be. You are to believe as jurors what you would believe as jurors, and there is no rule or law which requires you to believe as jurors what you would not believe as jurors.

"4. The Court instructs the jury that negligence is the omission to do something which a reasonable man, guided by the

ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do.

"5. The Court instructs the jury that there is no precise speed fixed at which a motor shall be operated upon the public highways of this state, but the law prohibits a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

Counsel's objection to the first instruction is that the evidence discloses that plaintiff's intestate had entered Fifth Avenue not at a regular intersection, that he had placed himself in a position where ordinary care would not protect him and was at a place in the street where an ordinary man would exercise extraordinary care, but the jury was told by the concluding sentence of this instruction that he was not required to exercise extraordinary care or diligence and that this was clearly misleading and erroneous. This instruction was not strictly accurate. The plaintiff in this case was the administrator of Frank P. Firman, deceased, and wherever the word plaintiff appears therein, it refers of course to the deceased or plaintiff's intestate. The jury was probably not misled thereby and as an abstract proposition of law, we see no objection to it. However, under the facts as disclosed by this record, we think the final sentence could have well been omitted.

Counsel say that there was no evidence in the record which affords any basis for the estimation of damages and for that reason it was error to give the second instruction. The evidence is that deceased was a carpenter by occupation; that he rendered some services for his son, in and about his grocery establishment, and the law presumes pecuniary loss to have resulted to adult children

ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a prudent and reasonable man would not do.

"3. The Court instructs the jury that there is no precise

agreed fixed at which a motor vehicle operated upon the public highways of this state, but the law prohibits a rate of speed greater than is reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person."

Counsel's objection to the first instruction is that the evidence discloses that plaintiff's interests had entered into Avenue not at a regular intersection, that he had placed himself in a position where ordinary care would not protect him and was at a place in the street where an ordinary man would exercise

extraordinary care, but the jury was told by the concluding sentence of this instruction that he was not required to exercise

extraordinary care or diligence and that this was clearly misleading and erroneous. This instruction was not exactly accurate. The plaintiff in this case was the administrator of John P. Williams, deceased, and wherever the word plaintiff appears therein, it means of course to the deceased or plaintiff's interest. The jury was probably not misled thereby and as to the responsibility of law, we see no objection to it. However, under the facts a disposition by this record, we think the final sentence could have been omitted.

Counsel says that there was no evidence in the record which affords any basis for the allegation of negligence and that reason it was error to give this second instruction. The evidence is that deceased was a carpenter by occupation; that he rendered some services for his son, in and about his property establishment, and the law presumes pecuniary loss to have resulted to adult children

from the death of their parent. *Dukeman v. C. C. C. & St. L. R. R. Co.*, 237 Ill. 104. Furthermore, this very instruction was approved in *Bernier v. Ill. Cent. R. R. Co.*, 296 Ill. 464, 472

In their reply brief, counsel for appellants state that the third instruction stands out as the one most clearly erroneous. In support of this instruction, counsel for appellee refer us to *Mowat v. Sandel*, 262 Ill. App. 395, where it was held that it was not error to give an instruction which told the jury in substance that they were not required to believe a thing to be a fact simply because a witness had sworn to it. In commenting upon this instruction, the court said: "The jurors are supposed to be endowed with ordinary intelligence in determining whether testimony of a witness should or should not be believed". In *Stephens v. Elkins*, 169 Ill. App. 269, the court told the jury that they had a right to believe all the testimony of a witness or believe it in part or they may reject it altogether if they find, from a consideration of all the evidence, that such evidence is untrue or unreliable. In reversing the case and in commenting upon this instruction, the court said: "We regard the instruction as wrong. The jury have no right to reject or disregard the entire testimony of a witness except where he has wilfully sworn falsely as to a material fact and is not corroborated by other credible evidence. *Pollard v. The People*, 69 Ill. 148. 'It is the corrupt motive or the giving of false testimony, knowing it to be false, that authorizes a jury to disregard the testimony of a witness and the court to so instruct them'. *Overtoon v. C. & E. I. R. R. Co.*, 191 Id. 323."

In the instant case this instruction told the jury that "You are to take into account, etc." It is proper for the court to enumerate certain matters which the jury may consider in weighing the testimony of the several witnesses, but it is not the province of the court to enumerate some and make it mandatory

upon the jury to consider them but omit equally essential matters which the jury should have considered. Furthermore, this instruction permitted the jury to weigh the evidence, not in the light of rules of law, but in the light of their own ideas or experience and were to accept the testimony of a witness or reject it "as you may find the evidence to be" and "to believe as jurors what you would believe as men." This portion of the instruction did not limit such belief to the evidence in the case. In *The People v. Gardner*, 237 Ill. App. 211, at page 216, the court said: "Error is also assigned on the first instruction given for the People, in which the jurors were told that they were not at liberty to disbelieve as jurors, if they believed as men, without limiting such belief to the evidence in the case. The belief which is formed, whether as jurors or as man, should always be based upon the evidence; and neither as jurors nor as men should they form any belief concerning the guilt of a defendant except such as is based upon the evidence. This instruction was therefore erroneous."

Counsel's objection to both the fourth and fifth instructions are that they are abstract in form and that the fifth instruction is not supported by any evidence in the record. The ninth given instruction for the defendants was substantially the same as plaintiff's fourth instruction and it has been held that a party has no right to complain of an error in his opponent's instructions when a like error appears in an instruction given at his request. *West Chicago St. R. R. Co. v. Buckley*, 200 Ill. 260. And it has also been held that the giving of an abstract proposition of law, if correct, will not reverse.

The evidence found in this record is such as to require that the jury be accurately instructed as to the law and for the error in giving the third instruction on behalf of the plaintiff below, the judgment will be reversed and the cause remanded.

upon the jury to consider that not only equally essential matters which the jury should have considered. Furthermore, this instruction permitted the jury to weigh the evidence, not in the light of rules of law, but in the light of their own ideas or experience and were to accept the testimony of a witness or reject it "as you may find the evidence to be, and" to believe or disbelieve what you would believe as men." This portion of the instruction did not limit each belief to the evidence in the case. In *The People v. ...*, 337 Ill. App. 211, at page 218, the court said: "Error is also assigned on the first instruction given for the people, to wit: the jurors were told that they were not at liberty to disbelieve as jurors, if they believed as men, without limiting each belief to the evidence in the case. The belief which is formed, whether as jurors or as men, should always be based upon the evidence and neither as jurors nor as men should they form any belief concerning the guilt of a defendant except upon as is based upon the evidence. This instruction was therefore erroneous." Counsel's objection to both the fourth and fifth instructions the fact they are abstract in form and do not give instruction is not supported by any evidence in the record. The third instruction for the defense was substantially the same as plaintiff's fourth instruction and it has been held that a party has no right to complain of an error in his opponent's instructions when a like error appears in an instruction given at his request. *West Chicago Ry. v. ...*, 300 Ill. 400. And it has also been held that the giving of an abstract proposition of law, if correct, will not reverse.

The evidence found in this record is such as to require that the jury be necessarily instructed as to and for the error in giving the third instruction to behalf of the plaintiff below, the judgment will be reversed and the case remanded.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

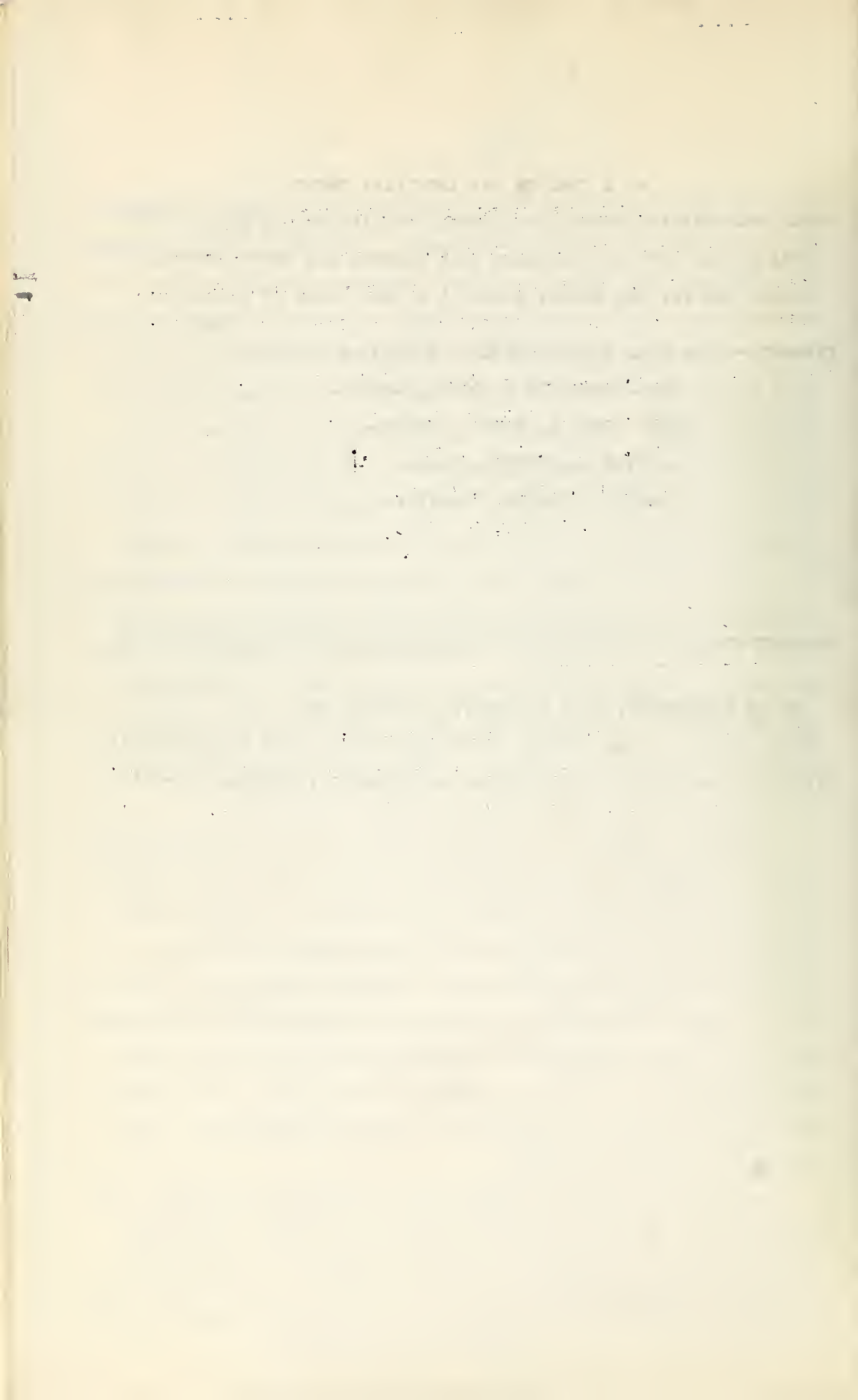
JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 9 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 622'

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 9 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A. D. 1937

Lena Edson, Executrix under the
Last Will and Testament of Ole
Edson, deceased,

Appellant,

vs.

Appeal from the Circuit Court
of Boone County

Chicago and Northwestern Railway
Company, a corporation,

Appellee,

WOLFE, J.

In the Village of Poplar Grove, on July 17, 1930, Ole Edson, now deceased, was walking north on the sidewalk on the east side of State Street, which runs north and south, and is the principal street of said village. The Chicago & North Western Railroad Company, maintained a main track, and immediately north of it, a switch track, running across said street in an easterly and westerly direction. East of the crossing, the main track runs in nearly a straight line for approximately one mile. At the time in question, there was a weed-killing car which had canvass extending down to the level of the rails, through which steam was forced for the purpose of killing weeds and other vegetation on the railroad right-of-way. This weed-killing car was headed east on the switch track. Edson, who was on the east side of State Street, stepped between the rails of the main track intending to go north across the intersection. At this time, the weed-killing train, which consists of the engine, the weed-killing car, and a caboose, was making a loud hissing noise and began to move east on the side track, blocking the sidewalk on which Edson was walking, so that he could not go on across as he intended. While Edson was standing between the rails of the main track, or very

In the Supreme Court of Illinois

Second Division

February Term, A. D. 1937

Less than, Executive Order No.
Last will and Testament of the
Estate, deceased,

Applicant,

Respondent from the Illinois Court

vs.

of Illinois Court

Chicago and Northwestern Railway
Company, a corporation,

Respondent,

HOLDS, 1.

In the Village of Berlin Grove, on July 17, 1930, the
Estate, was deceased, was walking north on the sidewalk on the
east side of State Street, which runs north and south, and is the
principal street of said Village. The Chicago & North Western
Railroad Company, maintained a main track, and immediately north
of it, a second track, running across said street in an easterly
and westerly direction. East of the crossing, the main track runs
in nearly a straight line for approximately one mile. At the time
in question, there was a wood-killing car which had crossed the
sidewalk from the level of the rails, through which there was
forced for the purpose of killing weeds and other vegetation on
the railroad right-of-way. This wood-killing car was loaded with
on the railroad track. There, was on the east side of State
Street, a gap between the rails of the main track, extending to
the north corner the intersection. At this time, the wood-killing
train, while passing the corner, the wood-killing car, and a
passenger, was making a loud hissing noise and began to move south
on the track, blocking the sidewalk on which the Estate
was walking, so that it could not go on across as he intended. While
there was a conflict between the rail & of the main track, the very

close to said main track, a passenger train approached from the east. Edson saw it and jumped backwards, but did not quite clear the approaching train. The end of the pilot beam above the cow-catcher struck and injured him, and from these injuries, he died.

Lena Edson, as executrix of the last will and testament of Ole Edson, deceased, started suit in the Circuit Court of Boone County, against the Railroad Company, alleging that it was through its negligence that Ole Edson was killed, and asked damages in the amount of \$10,000. The defendant filed its answer to the petition. The case was tried before a jury. At the conclusion of the plaintiff's case, the defendant entered a motion for a directed verdict. The court sustained the motion, and directed the jury to find the defendant not guilty. The jury so found. Judgment was entered on the verdict in favor of the defendant. It is from this judgment that this appeal is prosecuted.

The appellant claims that the court erred in sustaining a special demurrer to the complaint. It was also assigned as error that the court erred in refusing to admit proper evidence on behalf of the plaintiff-appellant. The main error relied upon for reversal is, that the court erred in granting the motion of the defendant to instruct the jury to find the defendant not guilty.

When a trial court is requested to instruct the jury to find for the defendant, and contributory negligence of the plaintiff is urged, it is the rule that the question of due care on the part of the plaintiff is for the jury to decide, when there is any evidence which, with all legitimate inferences may be legally and justifiably drawn therefrom, tends to show the use of due care, but where the evidence with all legitimate inference that may be drawn therefrom, does not tend to show due care on the part of the plaintiff, the trial court should instruct the jury to return a verdict for the defendant. The rule itself does not give courts much trouble, but applying this rule to the facts in a

close to said main street, a passenger train approached from the east. When saw it and turned back, but did not stop after the approaching train. The end of the pilot beam above the car-
tender struck and injured him, and from these injuries, he died.
Lena Dixon, an executrix of the last will and testament of
the above deceased, stated that in the District Court of Boone
County, against the railroad company, claiming that it was negligent
in its negligence that the child was killed, and asked damages in
the amount of \$10,000. The defendant filed the answer to the
petition. The case was tried before a jury. In the conclusion of
the plaintiff's case, the defendant entered a motion for a directed
verdict. The court sustained the motion, and directed the jury to
find the defendant not guilty. The jury so found. Judgment was
entered on the verdict in favor of the defendant. It is from
this judgment that this appeal is presented.
The appellant claims that the court acted in violation
of a special statute to the contrary. It was his contention
error that the court acted in relation to admit proper evidence on
behalf of the plaintiff-appellant. The main error relied upon
for reversal is, that the court acted in granting the motion of
the defendant to instruct the jury to find the defendant not guilty.
When a trial court is requested to instruct the jury to
find for the defendant, and contradictory negligence of the plaintiff
is urged, it is the rule that the question of the error on the part
of the plaintiff is for a jury to decide, where there is any
evidence on which, with all favorable inferences may be legally
and justifiably drawn therefrom, tends to show the act of the defendant
but where the evidence with all favorable inferences that may be
drawn therefrom, does not tend to show the act of the defendant
the plaintiff, the trial court should instruct the jury to return
a verdict for the defendant. The rule itself does not give
counsel much trouble, but applying this rule to the facts in

particular case has caused the court some difficulty. Every case must be decided on its own particular facts. In this case, Edson, a man of 72 years, started to walk across the railroad tracks and could see that there was a train upon the side track. On account of the movement of this particular train, his passage was blocked and he stood in the middle of the main track on which he knew that other trains were likely to pass at any time. With the exception of a slight obstruction at one particular point, he had a clear view for a great distance down the main track to the east, from which the passenger train approached which killed him. So far as the evidence shows, he did nothing after he stepped on the main line of the defendant's railroad track to ascertain if a train was coming, but focused his attention on the weed-killing machine, which was making considerable noise.

The last paragraph on page 29 of appellant's brief, is as follows: "There can be no argument but that there was evidence and plenty of it that the statutory signals were not given for this crossing. And again it is shown, without doubt, that the deceased stood on the main track while the weed-killing train obstructed his passage to the north. He stood there for some appreciable time, during which he was in full view of those operating the engine on the fast train, yet there was not the slightest sound from the whistle of that train. It gave no special warning to this man whom the operator could see standing on the track."

It appears to us that if the operator of this train could see the deceased standing on the main track of the railroad, that all reasonable minds would agree that the man standing in a place he knew, or should have known to be a dangerous place, could, and should have seen the approaching train in time to have avoided injury to himself.

It is our conclusion that the trial court properly instructed the jury to find the defendant not guilty, since plaintiff intestate, Edson, was guilty of contributory negligence, which was the proximate cause of his injury, and at the time of said injury, he was not in the exercise of ordinary care and caution for his own safety. The other assignment of error of the appellant we have not discussed because this one question disposes of the whole case.

The judgment of the trial court is affirmed.

Judgment Affirmed.

It is our conclusion that the trial court properly instructed
as the jury to find the defendant not guilty, since plaintiff
instructed, there, was guilty of contributory negligence, which
was the proximate cause of his injury, and at the time of said
injury, he was not in the exercise of ordinary care and caution
for his own safety. The other error was of error of the
appeals we have not discussed because this one question dis-
poses of the whole case.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1273
AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois;

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESPER, Sheriff.

291 I.A. 622²

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 9 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

THE UNIVERSITY OF CHICAGO
LIBRARY
1118

THE UNIVERSITY OF CHICAGO
LIBRARY
1118

In the Appellate Court of Illinois

Second District

May Term, A. D. 1937

J. C. Proctor Lumber Co.,

a corporation,

Appellant,

vs.

Appeal from the Circuit Court

Midwest Investment & Finance Co.,

of Peoria County

a corporation, O. F. Smith and

D. M. Smith,

Appellees,

WOLFE, J.

J. C. Proctor Lumber Co., a corporation, brought suit against the Midwest Investment & Finance Co., a corporation, and O. F. Smith, and D. M. Smith, defendants-appellees, on a note of \$406.06 and interest thereon. The plaintiff-appellant is the assignee of the payees of the note. The case was submitted to the court without a jury, upon the pleadings and a stipulation of facts. The court found the issues in favor of the defendants and dismissed the suit, and assessed the costs against the plaintiff. From this judgment the original plaintiff brings the case to this court for review.

It is agreed that the following statement of facts by the appellant, in its brief, is substantially correct: "On November 21, 1930, the defendants signed and delivered to the payees a note in the principal sum of \$406.06, payable as per separate agreement after date, to the order of Hardin L. Stilley and Ida M. Stilley, for value received with interest at seven per cent per annum after date. On the same day the defendants also delivered to the said payees the certain separate agreement which was signed only by Midwest Investment Co., by D. M. Smith, secretary, which was to the effect that the said note shall be due and payable at such time that certain

In the Appellate Court of Illinois

Second District

May Term, A. D. 1937

L. C. Proctor Lumber Co.,

a corporation,

Appellant,

vs.

of Tazewell County

Midwest Investment & Finance Co.,

a corporation, O. E. Smith and

D. M. Smith,

Appellees.

WOLF, J.

L. C. Proctor Lumber Co., a corporation, brought suit against the Midwest Investment & Finance Co., a corporation, and O. E. Smith, and D. M. Smith, defendants-appellees, on a note of \$405.00 and interest thereon. The plaintiff-appellant is the assignee of the payees of the note. The case was submitted to the court without a jury, upon the pleadings and a stipulation of facts. The court found the issues in favor of the defendants and dismissed the suit, and assessed the costs against the plaintiff. From this judgment the original plaintiff brings the case to this court for review.

It is agreed that the following statement of facts by the appellant, in its brief, is substantially correct: "On November 21, 1930, the defendants signed and delivered to the payee a note in the principal sum of \$405.00, payable as per separate agreement after date, to the order of Martin L. Stille and Ida E. Stille, for value received with interest at seven per cent per annum after date. On the same day the defendants also delivered to the said payee the certain separate agreement which was signed only by Midwest Investment Co., by D. M. Smith, secretary, which was to the effect that the said note shall be due and payable at such time that certain

purchasers, Clair Dillon and Eleanor Jean Dillon, or their assigns, reduce the principal due on a contract for deed to property known as Lot 39, Block 3, Altamont Park, in the City of Peoria, Illinois, to such an amount that we (meaning the defendants) or they can secure a loan for an amount sufficient to pay off the balance due on their contract for deed. Both the aforesaid note and separate agreement were written and prepared by the said defendants or their attorney or agent. At the time of receiving the said note and separate agreement, the said Hardin L. Stilley and Ida M. Stilley executed and delivered to the defendant, D. M. Smith, a warranty deed to the said real estate, and at the same time the said Hardin L. Stilley and Ida M. Stilley also assigned to the said D. M. Smith all their right, title and interest in certain articles of agreement dated May 17, 1930, by which the said Hardin L. Stilley and Ida M. Stilley had agreed to convey the said real estate to Clair Dillon and Eleanor Jean Dillon for the total sum of \$4,000.00, payable in two payments of \$200.00 each, and the balance at the rate of \$35.00 per month. By the stipulation of facts it is shown that on the aforesaid date of November 23, 1930, there was also in effect a mortgage against the said premises, given by Hardin L. Stilley and Ida M. Stilley to the Farmers' Savings Loan and Homestead Association for the principal sum of \$2,600.00, which was dated and duly recorded on August 6, 1930, which mortgage was later released of record on December 13, 1935.

"Subsequent to November 21, 1930, the said Clair Dillon and Eleanor Jean Dillon made nine monthly payments to D. M. Smith as called for by the contract for deed, and on October 20, 1931, the said Clair Dillon and Eleanor Jean Dillon failed to make the payment as provided by their said contract for deed. On October 28, 1931, the defendants sent by registered mail to Clair Dillon and Eleanor Jean Dillon a demand for the immediate possession of the property,

purchase, Oliver Dillon and Eleanor Jean Dillon, or their assigns, reduce the principal due on a contract for deed to property known as Lot 30, Block 8, Litchmont Park, in the City of Peoria, Illinois, to such an amount that he (meaning the defendants) or they can secure a loan for an amount sufficient to pay off the balance due on their contract for deed. Both the aforesaid note and said rate agreement were written and prepared by the said defendants or their attorney or agent. At the time of receiving the said note and separate assignment, the said Martin L. Stille and Ida M. Stille executed and delivered to the defendant, L. E. Smith, a warranty deed to the said real estate, and at the same time the said Martin L. Stille and Ida M. Stille also assigned to the said L. E. Smith all their right, title and interest in certain articles of agreement dated May 17, 1930, by which the said Martin L. Stille and Ida M. Stille had agreed to convey the said real estate to Oliver Dillon and Eleanor Jean Dillon for the total sum of \$4,000.00, payable in two payments of \$200.00 each, and the balance at the rate of 7.50% per annum. By the stipulation of facts it is shown that on the aforesaid date of November 23, 1930, there was also in effect a mortgage against the said premises, given by Martin L. Stille and Ida M. Stille to the Farmers' Savings Loan and Investment Association for the principal sum of \$2,500.00, which was dated and duly recorded on August 4, 1930, which mortgage was later released of record on December 15, 1930.

"Subsequent to November 23, 1930, the said Oliver Dillon and Eleanor Jean Dillon made nine monthly payments of \$100.00 each as called for by the contract for deed, and on December 23, 1931, the said Oliver Dillon and Eleanor Jean Dillon failed to make the payment as provided by their said contract for deed. On October 23, 1931, the defendants sent by registered mail to Oliver Dillon and Eleanor Jean Dillon a demand for the immediate possession of the property.

which demand was signed by the Midwest Investment & Finance Co., and on December 1, 1931, the Midwest Investment & Finance Co., sent by registered mail, a letter to Hardin L. Stilley stating that Clair Dillon had defaulted in his obligations under the articles of agreement, and that if the defendants were expected to continue to be liable on their note to the Stilleys, the Stilleys must come in immediately and pay up the delinquency of \$143.23 as claimed by the defendants. The said Hardin L. Stilley and Ida M. Stilley did not make any payment to the defendants as requested by said letter. On December 17, 1931, a quit claim deed covering said property was executed and delivered to the defendant, D. M. Smith, by the said Clair Dillon and Eleanor Jean Dillon, and later recorded on March 15, 1932, and the said Dillons were released from any further liability on their said contract for deed by the defendant, D. M. Smith. ~~xxxxxxx said Clair Dillon xxxxxx Eleanor Jean Stilley xxxxxx~~
~~xxxxxxx March 15, 1932, xxxxxx the said Clair Dillon xxxxxx~~
~~xxxxxxx further liability xxxxxx their xxxxxx contract xxxxxx~~
~~xxxxxxx xxxxxx~~ On December 18, 1931, the said Clair Dillon filed a petition in bankruptcy. Thereafter on March 8, 1932, the defendant, D. M. Smith sold the property on articles of agreement to one Charles Beeler, for the sum of \$3,467.50, which contract was paid off in full on December 13, 1935, and the mortgage against the premises of the Farmers' Savings Loan and Homestead Association was satisfied and released.

"On February 27, 1935, the possession of the note and separate agreement was given by the said Hardin L. Stilley and Ida M. Stilley to the J. C. Proctor Lumber Co., a corporation, the plaintiff-appellant herein, as collateral security to secure an account owed to the plaintiff-appellant by the said Hardin L. Stilley and Ida M. Stilley. Thereafter the said Hardin L. Stilley died, and on February 25, 1936, a further assignment for a consideration was obtained by the plaintiff-appellant from Ida M. Stilley."

which demand was signed by the Midwest Investment & Finance Co., and on December 1, 1931, the Midwest Investment & Finance Co., sent by registered mail, a letter to Hardin L. Stille stating that Clair Dillon had defaulted in his obligations under the articles of agreement, and that if the defendants were expected to continue to be liable on their note to the Stilles, the Stilles must come in immediately and pay up the delinquency of \$14,330 as claimed by the defendants. The said Hardin L. Stille and Ida M. Stille did not make any payment to the defendants as required by said letter. On December 14, 1931, a quit claim deed covering said property was executed and delivered to the defendant, D. M. Smith, by the said Clair Dillon and Eleanor Jean Dillon, and later recorded on March 15, 1932, and the said Dillons were released from any further liability on their said contract for deed by the defendant, D. M. Smith.

On February 27, 1932, the possession of the note and separate agreement was given by the said Hardin L. Stille and Ida M. Stille to the T. C. Proctor Lumber Co., a corporation, the plaintiff-appellant herein, an collateral account to secure an account owed to the plaintiff-appellant by the said Hardin L. Stille and Ida M. Stille. Thereafter the said Hardin L. Stille died, and on February 28, 1932, a further assignment for a consideration was obtained by the plaintiff-appellant from the said Stille.

The complaint consists of one count and alleges that the defendants, the Midwest Investment & Finance Co., and the Smiths, made and delivered to Hardin Stilley and Ida M. Stilley, a note for \$406.06, "payable as per separate agreement after date"; that the plaintiff is the assignee, holder and owner of the said note and separate agreement; that no part of the note has been paid; that all conditions necessary to be performed prior to the duty of the defendant to pay, have been met.

The defendants filed their answer to the complaint, in which they admitted the execution of the note and the "separate agreement". They neither admitted nor denied that the plaintiff is the owner and the holder of the written instruments. The answer alleges that the note in question was made upon the express consideration that Clair Dillon and Eleanor Jean Dillon were to make payments as provided in the written contract for deed; that they failed to make said payments; that in said contract it is provided that, "Time is the essence of the contract"; that after the Dillons had made default in their payments, defendants demanded immediate possession of the property and served a written demand therefor; that defendants notified Hardin Stilley, of the Dillon's default in carrying out their obligation and offered the Stilleys the opportunity of paying the deficiency, which amounted to \$143.23; that the Stilleys did not avail themselves of the opportunity to pay the delinquency; that on December 18, 1931, Clair Dillon filed his petition in bankruptcy in the District Court of the United States, Southern District of Illinois, and by said action he forfeited any and all rights, title, and interest in the property; that the plaintiff, the Proctor Lumber Co., as assignee of the Stilleys, took the note subject to all the defenses that the defendants had against the Stilleys.

The plaintiff filed a replication to the defendant's answer. They admit some of the allegations, and some they neither admit nor

The complaint consists of one count and alleges that the defendants, the Midwest Investment Finance Co., and the plaintiff, made and delivered to Hardin Elliff, and Ida M. Elliff, a note for \$400.00, payable as per separate agreement after date; that the plaintiff is the assignee, holder and owner of the said note and separate agreement; that no part of the note has been paid; that all conditions necessary to be performed prior to the duty of the defendant to pay, have been met.

The defendant filed their answer to the complaint, in which they admitted the execution of the note and the "assignment agreement". They neither admitted nor denied that the plaintiff is the owner and the holder of the written instrument. The answer alleges that the note in question was made upon the express consideration that Elton Dillon and Elton Jean Dillon were to make payments as provided in the written contract for deed; that they failed to make said payments; that in said contract it is provided that, "Time is the essence of the contract"; that after the Eltons had made default in their payments, defendant removed and took possession of the property and served a written demand therefor; that defendant notified Hardin Elliff, of the Eltons' default in carrying out their obligation and offered the Elliffs the opportunity of paying the deficiency, which amounted to \$48.43; that the Elliffs did not avail themselves of the opportunity to pay the deficiency; that on December 1, 1931, Elton Dillon filed his petition in bankruptcy in the District Court of the United States, Southern District of Illinois, and by said petition he forfeited any and all rights, title, and interest in the property; that the plaintiff, the Procter Lumber Co., as assignee of the Elliffs, took the note subject to all the defenses that the defendant had against the Elliffs.

The plaintiff filed a replication to the defendant's answer. They admit some of the allegations, and some they admit and do not

deny, but call for strict proof of the same. The note sued upon is as follows:

"\$406.06 Peoria, Illinois, November 21st, 1930

As Per Separate Agreement after date We promise to pay to the order of Hardin L. Stilley and Ida M. Stilley Four Hundred Six and 06/100 Dollars at 704 Peoria Life Bldg., Peoria, Illinois.

Value received with interest at 7 per cent per annum after date.

Midwest Investment Co.
O. F. Smith
D. M. Smith

No. Due
On Reverse Thereof:

Ida M. Stilley
Hardin L. Stilley"

The separate agreement referred to in the note is as follows:

Agreement.

"This Agreement made at Peoria, Illinois, this 21st day of November, A. D. 1930.

With reference to the note for Four Hundred Six and 06/100 Dollars, dated this date and given by the Undersigned Company to Hardin L. Stilley and Ida M. Stilley, this note shall be due and payable at such time that the purchasers, Clair Dillon and Eleanor Jean Dillon, or their assigns, reduce the principal due on a contract for Deed to property known as Lot Thirty-nine (39), Block Three (3), Altamont Park to such an amount that we or they can secure a loan for an amount sufficient to pay off the balance due on the aforesaid contract for Deed.

"If the aforesaid purchasers continue their payments according to the contract without default, it is agreed that the aforesaid note shall be paid to the above mentioned payees without regard to whether the contract can be refinanced or not, five years from date.

Midwest Investment Co. (Seal)
By D. M. Smith, Secy. (Seal)"

It is insisted by the appellant that by the terms of the note, and by the separate agreement, the conditions upon which the note was to be paid, had been complied with, and therefore, the defendants should be compelled to pay their obligations; that the defendant had destroyed the condition on which the note should be paid, and therefore could not escape liability. In support of their contention, the appellant cites the case of Jordan vs. Busch, 285 Ill. App. 217, in which it is stated: "The rule of law is, that when the plaintiff agreed to pay out money from a fund which is derived only from a certain source, this condition is for the benefit of the

deny, but call for strict proof of the same. The note was when it

as follows:

"\$400.00 Peoria, Illinois, November 13th, 1930

After separate agreement after note is promised
to pay to the order of Martin L. Stille and Ida L.
Stille four hundred six and 00/100 dollars to 704
Peoria Life Bldg., Peoria, Illinois.

Value received with interest at 7 per cent per

annum after date.

Midwest Investment Co.

O. W. Smith

D. W. Smith

No. One

On Reverse Hereof:

Ida L. Stille

Martin L. Stille

The separate agreement referred to in the note is as follows:

Agreement.

"This Agreement made at Peoria, Illinois, this 31st day of

November, A. D. 1930.

With reference to the note for one hundred six and 00/100
dollars, dated this date and given by the Undersigned Company to
Martin L. Stille and Ida L. Stille, this note shall be and
payable at such time that the purchasers, Martin L. Stille and Ida L.
Stille, or their assigns, receive the principal due on a contract
for deed to property known as Lot Thirteen (13), Block Three (3),
Altamont Park to such an amount that no or they can secure a loan for
an amount sufficient to pay off the balance due on the aforesaid con-
tract for deed.

"If the aforesaid purchasers continue their payment according
to the contract without default, it is agreed that the aforesaid note
shall be paid to the above mentioned payee without regard to whether
the contract can be refinanced or not, five years from date.

Midwest Investment Co.

(Seal)

O. W. Smith, Secy.

It is further agreed that the applicant must at the time of the

note, and by the separate agreement, the conditions upon which the

note was to be paid, and been complied with, and therefore, the

defendants should be compelled to pay their obligation; and the

defendants had destroyed the condition on which the note should be

paid, and therefore could not escape liability. In support of their

contention, the applicant cites the case of Jordan vs. Green, 280 Ill.

App. 217, in which it is stated: "The rule of law is, that when the

plaintiff agreed to pay out money from a fund which is derived only

from a certain source, this condition is for the benefit of the

promisor, and, if he alienates the source of that fund, he cannot escape liability. It is a principle of fundamental justice that if a promisor himself is the cause of a failure to perform, either of an obligation due him, or of a condition upon which his own liability depends, he cannot take advantage of the failure." The same effect is the ruling in the case of the Central Illinois Company vs. Nichols, 286 Ill. App. 66.

The appellees seriously contend that they have done nothing to alienate or destroy the condition upon which this note should be paid. In their answer they expressly charge, that the Dillons defaulted in their payments on their contract for a deed; that they served a written notice upon the Dillons to pay or surrender their contract; that they also served notice on the Stilleyes, that the Dillons were in default, and that if the Stilleyes expected payment on their note they should keep the payments on the contract of sale in full force and effect, otherwise the defendant would be released from paying the note; that shortly after the Dillons became in default on their payments, Dillon went into bankruptcy. These facts were all admitted to be true at the hearing of the case. They were set forth in the answer as a legal defense to the cause of action, and if proven, would be a good defense to the suit. The sufficiency of the answer as being a legal defense to the plaintiff's cause of action was not challenged. The suit went to trial upon the theory that these facts, if proven, were a defense to the cause of action.

It is our conclusion that the defendants had a right to rely upon the written contract, that, "Time was the essence of the contract", and, if the Dillons did not pay according to the contract, the same could be forfeited, and the note would become void. The Stilleyes had notice of all the transactions between the Dillons and the defendants. The Dillons, and not the defendants, were the ones that destroyed the condition upon which the note should become due and payable. The

provision, and, if he alienates the source of that fund, he cannot escape liability. It is a principle of fundamental justice that if a promisor himself is the cause of a failure of performance, either by an omission or by a commission, or of a condition upon which his own liability depends, he cannot take advantage of the failure. The same effect is the result in the case of the Central Illinois Company v. Nichols, 208 Ill. 471, 88.

The appellees seriously contend that they have done nothing to alienate or destroy the condition upon which this note should be paid. In their answer they expressly admit, that the Illinois defaulted in their payments on their contract for a bond; that they served a written notice upon the Illinois to pay or surrender their contract; that they also served notice on the Illinois, that the Illinois were in default, and that if the Illinois refused payment on their note they should keep the payment on the contract of sale in full force and effect, otherwise the defendant would be released from paying the note; that shortly after the Illinois became in default on their payments, Illinois went into bankruptcy. These facts were all admitted to be true at the hearing of the case. They were set forth in the answer as a legal defense to the cause of action, and if proven, would be a good defense to the suit. The sufficiency of the answer as being a legal defense to the plaintiff's cause of action was not challenged. The suit went to trial upon the theory that these facts, if proven, were a defense to the cause of action. It is our conclusion that the defendant has a right to rely upon the written contract, that, when the fact comes to the contract, and, if the Illinois did not pay according to the contract, the same could be forfeited, and the note would become void. The Illinois had notice of all the transactions between the Illinois and the defendants. The Illinois, and not the defendants, were the ones that destroyed the condition upon which the note would become due and payable. The

note was not assigned to the plaintiff until more than three years after Dillon's default and bankruptcy. The assignee of the note stood in no better position than the Stilleys, its assignor, as to the defense, against the collection of the note.

We find no reversible error in the case, and the judgment of the Circuit Court of Peoria County is hereby affirmed.

Affirmed.

note was not assigned to the plaintiff until more than three years after Dillon's default and bankruptcy. The assignment of the note stood in no better position than the bill of exchange, as to the defense, against the collection of the note. we find no reversible error in the case, and the judgment of the Circuit Court of Lewis County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS,

} ss.

SECOND DISTRICT

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 4th day of May, in the
year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. BLAINE HUFFMAN, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. FRED G. WOLFE, Justice.

JUSTUS L. JOHNSON, Clerk.

RALPH H. DESFER, Sheriff.

291 I.A. 622³

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 7 1937

the opinion of the Court was filed in the Clerk's
Office of said Court, in the words and figures following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT
MAY TERM, A. D. 1937.

JAMES MARSH,

Appellee

vs.

Appeal from Circuit Court
Boone County.

NATIONAL LOCK COMPANY and
F. G. HOGLAND,

Appellants.

HUFFMAN - P.J.

This is a suit for libel brought by appellee against appellants in the Circuit Court of Winnebago County. It was tried in Boone County on change of venue. Trial resulted in a verdict in favor of appellee for \$1000, and appellants bring this appeal from judgment entered thereon.

Appellee charged appellants with publishing a libelous article on September 10, 1933, in the Rockford Morning Star. The article referred to was a full page publication inserted in said paper on the above date at the instance of appellants. It grew out of a strike in appellants' plant in which it appears appellee was one of the instigators and leaders. Appellee entered the employment of appellants May 10, 1933. He was discharged August 11, 1933, due to complaints of appellants' employees and foremen. Following appellee's discharge, events transpired out of which the matters complained of herein arose. Appellee in his complaint alleged that he was a married man, living with his wife and four minor children; that appellants caused the article in question to be published, maliciously intending thereby to injure him and to bring him into public hatred, ridicule, scandal and disgrace. Appellants filed three pleas to the complaint, the first being what was then designated as the general issue; the second was a plea that the matters and things set forth in the publication were true and published with good motives, without malice, and for justifiable ends; and the third plea was that of privilege. In this plea appellants set up that the National Lock

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Company was a corporation with a large number of stockholders and bondholders, and with many persons employed by it, all of whom were mutually interested in the successful operation of the factory. It also set up that the corporation had outstanding orders for goods, which it was by contract obligated to fill; that it was the duty of the corporation and of its President Hogland, to keep the plant in operation so that those of its employees who desired to work, might work, and that undue harm might not come to its stockholders, bondholders, and those relying upon it for material under contract. Appellants set up that they had the right and it was their privilege to discuss publicly and in print the matters in controversy, and to present for the information of its employees, facts and circumstances connected with the strike, in order that its employees might decide of their own accord what action they wished to take with reference to continuing work in appellant plant.

The record contains over a thousand pages of evidence, which renders impracticable any discussion of the facts and many points urged. A discussion of a part of the facts would serve no good purpose. The record has been fully reviewed and such reference to same as hereinafter made, is solely for the purpose of convenience, and not upon a comparative basis.

In the publication appellee's employment and discharge by appellant company was set out, together with the date thereof. It was stated therein that appellee would leave his work before the regular quitting time and repair to the wash room, which habit caused operations to cease with respect to the other employees who were engaged in the particular department in which appellee might then be working. These employees were paid by what is commonly called piece work. Appellant plant had contracts for fittings with such companies as the Kelvinator Company. These workmen objected to appellee leaving his work in the above manner because it prevented them from finishing with the work that they then had on hands. It then states that following appellee's discharge, he became instrumental in the formation of a union styled the Federal Labor Union; that on August 31, 1933, he went to the main entrance of the plant and forbade the work-

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In the publication appellee's employment and discharge by appellant company was set out, together with the date thereof. It was stated therein that appellee would leave his work before the regular quitting time and report to the wash room, which habit caused operations to cease with respect to the other employees who were engaged in the particular department in which appellee might then be working. These employees were paid by what is commonly called piece work. Appellant plant had contracts for fittings with such companies as the Kelvinator Company. These workmen objected to appellee leaving his work in the above manner because it prevented them from finishing with the work that they then had on hands. It then states that following appellee's discharge, he became instrumental in the formation of a union styled the Federal Labor Union; that on August 31, 1933, he went to the main entrance of the plant and forbade the work-

men from entering, stating to them: "There is no work here today by order of the Government through the Federal Labor Union"; that he continued this conduct, and that as a consequence thereof some six hundred out of approximately twelve hundred employees did not return to work. It was further set out that no demand had ever been made on the plant executives respecting any grievances. It was then suggested that a committee from the various departments of the plant be selected by the employees to present to the management any grievances or other questions to be settled. The publication alleged that the plant was operating under the Federal Industrial Code provided for it by the N.R.A., and that it was observing the terms and conditions of such code, and solicited the employees to select their representatives to meet with the plant executives in accordance therewith. It set out that the plant had an average annual payroll of \$1,628,098.35, which was an average of \$106.13 per month for each employee. It set out the rights of its employees to organize and bargain collectively under the N.R.A., through representatives of their own choosing, and inviting them to do so. Certain references were made in the publication to appellee with respect to his employment, wherein it was stated that he represented to the company at the time of his employment that he was a married man living with his wife and four children, and that he needed the employment. It further appears therein with reference to appellee that he lived in Waukegan, Illinois, prior to moving to Rockford, and that he had certain unpaid obligations there; that he was dissatisfied with his work and was fussy; that he was an agitator and would tell the employees that they should strike; and that he had had a fight at a school house in Rockford, where he had previously been employed.

There is evidence on behalf of appellants tending to prove each of the allegations above referred to, which were made with reference to appellee. References to other events appeared in the publication, which were not charged to appellee. It appears from the evidence that appellee was married and lived with his wife and four children; that he came to Rockford from Waukegan; that he had certain outstanding accounts there; that he had had a fight with another employee at

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There is evidence on behalf of appellant tending to prove each of the allegations above referred to, which were made with reference to appellee. References to other events appeared in the publication, which were not charged to appellee. It appears from the evidence that appellee was married and lived with his wife and four children; that he came to Rockford from Waukegan; that he had certain outstanding accounts there; that he had had a fight with another employee at

a school house in Rockford, where he was employed, that he would leave his work at appellant plant prior to the other workmen who were engaged in his group; that these workmen complained of this conduct; that the foreman thereupon reported these complaints to the plant executives, who had appellee placed in other groups; that the same complaints were made by the workmen in the other groups, and that as a result thereof, appellee was discharged and advised at the time that he was being discharged because of these complaints and because of the fact that he had manifested a disposition not to be satisfied with his work; and that he was fussy and an agitator among the employees. The evidence shows that on August 31, when appellee stationed himself at the entrance of appellant plant and advised the men then coming on shift that there would be no work that day, that upon the attempt of one workman to enter, appellee struck him, knocking him to the ground; that he held his arm across the door and announced that the factory was closed by order of the Government through the Federal Labor Union; that he assisted in the organization of various demonstrations outside the plant grounds over a period of several days, and took part therein; that he intercepted appellants' workmen on their way to work, and threatened them if they returned to work. No arrests were made ^{at} the plant due to any activities of appellee. It further appears that appellee and his associates refused to attend any meeting with the plant executives and refused to submit any grievances for consideration.

Special damages are not alleged or claimed by appellee in his declaration. Where the publication itself is not libelous, some special damages resulting to the plaintiff must be specifically set forth in the declaration and such damages must be the regular and natural consequence of the words used. To sustain an action on the ground of special damages, it is necessary that the plaintiff set forth precisely in what way such damages resulted. Failure to so allege same in an action for libel precludes the plaintiff from offering any evidence thereof and from any recovery therefor.

When the language used, from its nature will have a reasonable and natural tendency to degrade or disgrace the person, or to render him

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Special damages are not alleged or claimed by appellee in his declaration. Where the declaration itself is not libelous, some special damages resulting to the plaintiff may be specifically set forth in the declaration and such damages must be the natural and necessary consequence of the words used. To sustain an action on the ground of special damages, it is necessary that the plaintiff set forth precisely in what way such damages resulted. Failure to so allege same in an action for libel precluded the plaintiff from offering any evidence thereof and from any recovery therefor.

When the language used, from its nature will have a reasonable and natural tendency to degrade or disgrace the person, or to render him

ridiculous or contemptible, such words are actionable per se because, the natural and proximate consequence therefrom will occasion pecuniary loss. The general rule of construction with reference to publications alleged to be libelous is, that the words are to be taken in the sense which is most obvious and natural. It is not the ingeniously possible construction, but the plainly normal construction, which determines the question, and in ascertaining whether the words are actionable, the court will not resort to a strained construction of the language used, but will look to the meaning which the words are naturally calculated to convey, and in so doing, the entire writing will be considered. The meaning of any particular phrase or sentence will be construed in connection with the remainder of the publication of which it forms a part. The fact that a single phrase if standing alone, or used in a different connection, may be capable of a different meaning than that to which it is susceptible in the connection in which it is actually used, will make no difference. The fact that supersensitive or imaginative persons may be able by reading between the lines of an article, to discover what they consider to be libelous and defamatory meaning, is not sufficient to make the article so. Neither can a party support a charge of libel by showing that the publication libeled another. The publication must be libelous as to the plaintiff, and the malice supporting the charge must flow from the defendant to the plaintiff and be personal to him. We do not find here that plaintiff was charged with the commission of such crime or other acts as could be said to subject him to public hatred, contempt, ridicule or disgrace, or anything that would engender an evil opinion of him in the minds of the people and deprive him of his station in society. Appellee claims that he was acting within his legal rights. It is not libelous to charge one with doing what the law approves.

Appellants conceded in the publication the right of its employees to quit their employment, and ^{to} ~~an~~ organize and make collective bargaining through representatives chosen by themselves. If the words used in the publication with reference to appellee are not actionable per se, nothing appears to show any pecuniary damage to the plaintiff,

ridiculous or contemptible, such words are actionable per se because, the natural and proximate consequence thereof will occasion pecuniary loss. The general rule of construction with reference to publications alleged to be libelous is, that the words are to be taken in the sense which is most obvious and natural. It is not the ingeniously possible construction, but the plainly normal construction, which determines the question, and in ascertaining whether the words are actionable, the court will not resort to a strained construction of the language used, but will look to the meaning which the words are naturally calculated to convey, and in so doing, the entire writing will be considered. The meaning of any particular phrase or sentence will be construed in connection with the remainder of the publication of which it forms a part. The fact that a single phrase is standing alone, or used in a different connection, may be capable of a different meaning than that to which it is susceptible in the connection in which it is actually used, will make no difference. The fact that superlative or imaginative persons may be able by reading between the lines of an article, to discover what they consider to be libelous and defamatory meaning, is not sufficient to make the article so. Neither can a party support a charge of libel by showing that the publication libeled another. The publication must be libelous as to the plaintiff, and the malice supporting the charge must flow from the defendant to the plaintiff and be personal to him. We do not find here that plaintiff was charged with the commission of such crime or other acts as could be said to subject him to public hatred, contempt, ridicule or disgrace, or anything that would engender an evil opinion of him in the minds of the people and deprive him of his station in society. Appellee claims that he was acting within his legal rights. It is not libelous to charge one with doing what the law approves.

Appellants conceded in the publication the right of its employees to put their employment, and ^{to} organize and make collective bargaining through representatives chosen by themselves. If the words used in the publication with reference to appellee are not actionable per se, nothing appears to show any pecuniary damage to the plaintiff,

and under the declaration filed, he would not be entitled to recover special damages. Uncomplimentary and unkind things frequently transpire in consequence of a mutual controversy, which at the time may leave the parties highly incensed, but when when viewed in retrospect are discovered to have lost their seeming viciousness. Taken in the view of the ordinary course of human conduct, we do not consider the publication was such as to bring the defendant into public hatred, contempt or ridicule, and cannot of itself be calculated to have prevented him from enjoying the same rights as a member of society, which were previously enjoyed by him.

On the whole of the record, the court is of the opinion that the verdict is against the manifest weight of the evidence. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

and under the declaration filed, he would not be entitled to recover special damages. Unconformably and making things frequently transpire in consequence of a mutual controversy, which at the time may leave the parties highly incensed, but when viewed in retrospect are discovered to have lost their seeming viciousness. Taken in the view of the ordinary course of human conduct, we do not consider the publication was such as to bring the defendant into public hatred, contempt or ridicule, and cannot of itself be calculated to have prevented him from enjoying the same rights as a member of society, which were previously enjoyed by him.

On the whole of the record, the court is of the opinion that the verdict is against the manifest weight of the evidence. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

Abstract

GEN.NO.9005

Ag.No.5

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT.

JANUARY TERM, A.D.1937.

291 I.A. 622⁴

ARTHUR L. FOGELMAN, as ADMIN-
ISTRATOR of the ESTATE OF MADE-
LINE FOGELMAN, DECEASED,
Substituted Plaintiff-
Appellee,

Appeal from the Circuit Court
of Montgomery County.

vs.

STEVE CHRISTOFF,
Defendant-Appellant

DAVIS, J.:

Madeline Fogelman in her life time recovered a judgment for \$4,000.00 upon the verdict of a jury, against Steve Christoff, the defendant, in the Circuit Court of Montgomery County, Illinois, from which judgment appellant took this appeal. The death of Madeline Fogelman, plaintiff-appellee, was suggested and Arthur L. Fogelman, Administrator of the Estate of Madeline Fogelman, Deceased, was substituted as plaintiff-appellee in said cause in this court.

She alleges in her complaint that on or about February 5, 1935, she was driving a 1934 Chevrolet truck delivery car in a southerly direction on U.S. Route 66, about two and one-half miles south of Litchfield, Illinois; that the defendant, Steve Christoff, was driving a certain other motor vehicle in a northerly direction upon said Route 66 and not regarding his duty in the premises he so carelessly and negligently drove and operated his automobile that by means thereof said automobile of defendant collided with the automobile driven by plaintiff and, as a result thereof, the plaintiff

Correct

REV. NO. 2000

10.10.0

IN THE
COURT OF THE COMMON PLEAS
FOR THE COUNTY OF MONTGOMERY

JANUARY TERM, A.D. 1937.

291 I.A. 632

ARTHUR L. FORDMAN, as Administrator of the Estate of MAD-
LINE FORDMAN, Deceased,
Plaintiff-Appellee,
vs.
STEVE CHRISTOFF,
Defendant-Appellant

Appeal from the Circuit Court
of Montgomery County.

DAVIS, J.:

Madeline Fordman in her life time recovered a judgment for \$4,000.00 upon the verdict of a jury, against Steve Christoff, the defendant, in the Circuit Court of Montgomery County, Illinois, from which judgment appellant took this appeal. The death of Madeline Fordman, plaintiff-appellee, was suggested and Arthur L. Fordman, Administrator of the Estate of Madeline Fordman, deceased, was appointed as plaintiff-appellee in said cause in this court. She alleges in her complaint that on or about February 1, 1936, she was driving a 1934 Chevrolet truck delivery car in a southerly direction on U.S. Route 66, about two and one-half miles south of Machesfield, Illinois; that the defendant, Steve Christoff, was driving a certain other motor vehicle in a northerly direction upon said Route 66 and not regarding his duty in the premises he so carelessly and negligently drove and operated his automobile that by means thereof said automobile of defendant collided with the automobile driven by plaintiff and, as a result thereof, the plaintiff

was greatly injured both internally and externally.

The answer of defendant admits he was driving an automobile at the place charged in the complaint, but denies that plaintiff was in the exercise of due care for her own safety and denies that he disregarded any duty in the premises; denies that he carelessly and negligently drove and operated his automobile or that he was guilty of any negligence.

By leave of court, obtained more than five months after the filing of his answer, the defendant filed a counter-claim in which he charged that the plaintiff so carelessly and negligently drove and managed said delivery truck that by and through such conduct the plaintiff ran into and struck with great force and violence the sedan which the defendant was driving and greatly injured him. In count two of his counter-claim the defendant charged that at the time there were no other vehicles on the highway; that he was driving in a northerly direction and that plaintiff was driving in a southerly direction towards defendant; that, about 300 or 400 feet south of where the two automobiles came in contact with each other, the right rear tire of his automobile had a blow out and thereby caused it to lose its balance and equilibrium and became difficult to control; that at a point 1,000 or 1,200 feet north of where the impact of the cars occurred the plaintiff saw defendant was having great difficulty to control his car, and when plaintiff saw defendant's car was out of balance and equilibrium it became and was her duty to stop the truck she was driving, but disregarding her duty she negligently continued to drive towards and against the automobile of the defendant.

In her answer to the counter-claim plaintiff denied all of the charges of negligence, and denied that the right rear tire on defendant's automobile had a blow out, thereby causing it to lose its balance, and denied that at a point 1,000 or 1,200 feet north of

was greatly injured both internally and externally.

The answer of defendant admits he was driving an automobile at the place charged in the complaint, but denies that plaintiff was in the exercise of due care for her own safety and denies that he disregarded any duty in the premises; denies that he carelessly and negligently drove and operated his automobile or that he was guilty of any negligence.

By leave of court, obtained more than five months after the filing of his answer, the defendant filed a counter-claim in which he charged that the plaintiff so carelessly and negligently drove and managed said delivery truck that by and through such conduct the plaintiff ran into and struck him with great force and violence and a sedan which the defendant was driving and greatly injured him. In count two of his counter-claim the defendant charged that at the time there were no other vehicles on the highway; that he was driving in a northerly direction and that plaintiff was driving in a southerly direction towards defendant; that, about 300 or 400 feet south of where the two automobiles came in contact with each other, the right rear tire of his automobile had a blow out and thereby caused it to lose its balance and equilibrium and become difficult to control; that at a point 1,000 or 1,200 feet north of where the impact of the cars occurred the plaintiff saw defendant was having great difficulty to control his car, and when plaintiff saw defendant's car was out of balance and equilibrium it became and was her duty to stop the truck she was driving, but disregarding her duty she negligently continued to drive towards and against the automobile of the defendant.

In her answer to the counter-claim plaintiff denied all of the charges of negligence, and denied that the right rear tire on defendant's automobile had a blow out, thereby causing it to lose its balance, and denied that at a point 1,000 or 1,200 feet north of

where the impact of the cars occurred she saw that defendant was having difficulty in controlling his car.

Upon a trial of said cause the jury returned a verdict for plaintiff in the sum of \$4,000.00, upon which judgment was rendered.

Appellant alleged, as grounds for reversal of said judgment, that the court erred in denying his motion for a directed verdict at the close of plaintiff's evidence and again at the close of all of the evidence, and in refusing the instructions accompanying said motions; that the court refused to admit proper evidence and admitted improper evidence for plaintiff over the objection of defendant; that the verdict of the jury is contrary to the evidence and that the court improperly gave instruction No.5 for plaintiff and improperly refused to give defendant's instructions 2, 3, 4 and 5.

At the close of the plaintiff's evidence and again at the close of all^{9f} the evidence appellant moved the court to direct a verdict in his favor, which motions the court denied and marked the instructions accompanying said motions "refused." Counsel for appellant argues at great length that the trial court should have directed a verdict against the plaintiff because the record shows that she was guilty of contributory negligence and therefore could not recover as a matter of law. A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the testimony demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of plaintiff. *McCune v. Reynolds*, 288 Ill. 188, 123 N.E. 317; It is not the province of the trial judge on such motion to weigh the evidence and determine where the preponderance is. Neither the trial court in the first instance

where the impact of the cars occurred and saw that defendant was having difficulty in controlling his car.

Upon a trial of said cause the jury returned a verdict for plaintiff in the sum of \$4,000.00, upon which judgment was rendered.

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At the close of the plaintiff's evidence and again at the close of all the evidence appellant moved the court to direct a verdict in his favor, which motions the court denied and asked the instructions accompanying said motions "refused." Counsel for appellant argues at great length that the trial court should have directed a verdict against the plaintiff because the record shows that she was guilty of contributory negligence and therefore could not recover as a matter of law. A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the testimony demanded to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of plaintiff. *McGinnis v. Reynolds*, 133 Ill. 189, 130 N.E. 317; it is not the province of the trial judge on such motion to weigh the evidence and determine where the preponderance is. Hence the trial court in the first instance

nor the court of review has anything to do with the question of the preponderance of the evidence or the credibility of the witnesses, when considering this question. *Geiger v. Geiger*, 247 Ill. 629, 93 N.E. 314.

"The question of law presented to the court upon a motion at the close of all of the evidence is whether, when all of the evidence is considered, together with all reasonable inferences from it in its most favorable aspect to the party against whom the motion is directed, there is a total failure to prove a necessary element of his case." *Nelson v. Stutz, Chicago Factory Branch, Inc.*, 341 Ill. 387, 173 N.E. 394. One of the necessary elements being that the plaintiff was in the exercise of ordinary care when the injury was received.

While the burden of proof is always on the plaintiff, in proceedings of this kind, to show that immediately prior thereto and at the time when the injury was received he was in the exercise of ordinary care, that question is one of fact, which must be determined by the circumstances attending and surrounding the injury. Whether the evidence tends to prove such care is a question of law. A court can only determine adversely to the plaintiff when no other conclusion can be reasonably drawn from the uncontradicted facts and from the evidence that is favorable to the plaintiff. *Pienta v. Chicago City Cy. Co.*, 284 Ill. 246, 120 N.E.1.

There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. *Stack, Admx. v. East St. L. & Sub. Ry. Co.*, 245 Ill. 308; 92 N.E. 241. We are of opinion from the evidence in the record that the

nor the court of review has anything to do with the question of the preponderance of the evidence or the credibility of the witnesses, when considering this question. *Geiger v. Geiger*, 247 Ill. 532.

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question of contributory negligence was properly submitted to the jury.

Counsel for appellant insists that the trial court should have directed a verdict against the plaintiff and submitted the case to the jury on the defendant's counter-claim. It is apparent that under the record in this case the trial court was without authority to direct a verdict against the plaintiff.

It appears that appellee left Litchfield on February 5, 1935, about 2:00 p.m., to visit her mother at Benld, going south on U.S. Route 66. She stopped at Rut's corner for a cup of coffee, after which she started south down the road; at Monke's crossing she passed a truck about a mile from where the accident happened, driving at the rate of 35 or 40 miles per hour, after which she slowed down to 35 miles per hour. At quite a distance she saw a car coming towards her, and there was a car ahead of her about 75 or 80 feet; as she got about to the crossing the first thing she knew the car coming from the south just seemed to fly right in front of her, and she tried to stop and applied the brakes; the driver of the car, when it came across in front of her, had his hand up and just seemed to be going wild; she was on the west side of the road; the next she remembered some people were assisting her; she was driving a Chevrolet delivery sedan. She did not see appellant's car get off of the slab on either side before the accident. He was coming straight up the road and the car was weaving. She saw defendant's car headed in her direction just long enough to get across the road; her car probably traveled twenty feet from the time appellant's car crossed the black line until the collision occurred. The Oldsmobile was headed towards the ditch on the left side of the road, going north. The truck had jammed into the car. Back of the truck was a plain skidding mark where the tires had slid for a distance of ten feet. They were straight with the road. An automo-

question of contributory negligence was properly submitted to the

jury.

Counsel for appellant insists that the trial court should have

directed a verdict against the plaintiff and submitted the case to the jury on the defendant's counter-claim. It is apparent that un-

der the record in this case the trial court was without authority

to direct a verdict against the plaintiff.

It appears that appellee left Littlefield on February 2, 1935,

about 2:00 p.m., to visit her mother at Denali, going south on U.S.

Route 66. She stopped at But's corner for a cup of coffee, after

which she started south down the road; at Locke's crossing she

passed a truck about a mile from where the accident happened, driving

at the rate of 35 or 40 miles per hour, after which she slowed

down to 35 miles per hour. At wife's distance she saw a car com-

ing towards her, and there was a car ahead of her about 75 or 80

feet; as she got about to the crossing the first thing she knew

the car coming from the south just seemed to fly right in front of

her, and she tried to stop and applied the brakes; the driver of

the car, when it came across in front of her, had his hand up and

just seemed to be going wild; she was on the west side of the

road; the next she remembered some people were assisting her; she

was driving a Chevrolet delivery sedan. She did not see appellant's

car get off of the slab on either side before the accident. He was

coming straight up the road and the car was weaving. She saw de-

fendant's car headed in her direction just long enough to get across

the road; her car probably traveled twenty feet from the time ap-

pellant's car crossed the black line until the collision occurred.

The Oldsmobile was headed towards the ditch on the left side of the

road, going north. The truck had jammed into the car. Back of the

truck was a plain skidding mark where the tires had slid for a dis-

tance of ten feet. They were straight with the road. An automo-

bile mechanic and garage operator hooked onto the Chevrolet to move the cars and found the brakes set, he released them and pulled the cars apart. There were skidding marks behind the Chevrolet, when he tried to move it. The speedometer was locked between 25 and 30 miles per hour. The right rear fender of the Oldsmobile was pushed down. It was against the tire, and the tire was cut in two places. The Oldsmobile had been off of the concrete on the east side of the road and the driver was trying to get back on the slab.

The evidence of the defendant discloses that he purchased his car on November 15, 1934, and had driven it about 2200 miles. It was equipped with 4 ply U.S. cord tires. On the day in question he was driving to Litchfield, and, as he got to Monke's crossing, he testified that the right rear tire on his car blew out and his car started swaying. He stepped on the brake and turned the car to the left side of the road and pulled to the right side and went a ways off of the road on the right side and back on the road; tried to right it the best he could and when he got about 150 or 175 feet from where the tire had blown out he got crosswise of the highway and swung in front of her car and there was a crash and Mrs. Fogelman drove into him. He had passed a car going towards Mt. Olive about a quarter of a mile before he reached the place of the accident. Appellant testified that Mrs. Fogelman visited him while he was in the hospital, came in a wheel chair; with reference to her husband, she said she was waiting for the car and was going to see her mother at Benld and had to wait until her husband came with the car, and he was about an hour late. I asked her, why didn't she try to stop before she hit me? She said that is how she broke her ankle, stepping on the brake trying to stop. The tires on his car did not show wear and had never been repaired and were

file mechanic and garage operator looked out the driveway to move the cars and found the engine set, he released them and pulled the cars apart. There were skidding marks behind the Chevrolet when he tried to move it. The speedometer was locked between 10 and 20 miles per hour. The right rear fender of the Oldsmobile was pushed down. It was examined the tires, and the tire was out in two places. The Oldsmobile had been off of the concrete on the east side of the road and the driver was trying to get back on the slab.

The evidence of the defendant discloses that he purchased his car in November 17, 1934, and had driven it about 2500 miles. It was equipped with a 4 ply tire. On the day in question he was driving to Indianapolis, and as he got to Monroe's Crossings he testified that the right rear tire of his car blew out and the car started swaying. He stepped on the brakes and turned the car to the left side of the road and pulled to the right side and went a ways off of the road on the right side and back on the road; tried to right it the best he could and when he got about 100 or 125 feet from where the tire had blown out he got out of the car and ran and swung in front of his car and there was a crowd and he fell non drove into him. He had passed a car going towards Mt. Olive about a quarter of a mile before he reached the place of the accident. Appellant testified that Mrs. Tolson visited him while he was in the hospital, came in a wheel chair; after returning to her husband, she said she was waiting for the car and was going to see her mother at Berlin and had to call until her husband came with the car, and he was about an hour later. I asked her, why didn't she try to stop before the accident? She said that she had the tire on her ankle, stepping on the brake trying to stop. The time on his car did not show year and had never been repaired and were

inflated properly. The automobile dealer, who sold the car to appellant, saw it the day following the accident at a garage in Mt. Olive. The right tire was down and he looked at it, and it was blown out. There was also testimony tending to show that there was no car 50 to 75 feet in front of Mrs. Fogelman at the time of the accident.

On re-direct-examination Mrs. Fogelman denied she had told appellant that her husband was late in bringing the car and that, if he had not been late, the accident would not have happened; and she also denied having any conversation with him about the accident.

A nurse, who attended Mrs. Fogelman when she was in the hospital, testified that she took her into the room occupied by Mr. Christoff and was there all of the time Mrs. Fogelman was in the room, that she heard the conversation between them, and that Mrs. Fogelman and herself and a patient in the other bed in the room were present, and Mr. Christoff was there in his bed; that Mrs. Fogelman did not tell appellant that her husband was an hour late and that, if he had not been the accident would not have happened; that Mrs. Fogelman did not tell appellant that she never would forget when his car came across the road, that he had both hands gripped on the steering wheel and his face looked tragic; that Mrs. Fogelman did not tell appellant that she saw that he had lost control of the car but she could not stop, that she broke her ankle stepping on the brake.

Appellant takes the position that the road was straight and clear of cars for a long distance, that appellee was driving fast and that there was no car ahead of her 75 or 80 feet, or more, near the scene of the accident, to obscure her vision of the approaching car, and that appellee must have seen that appellant was in trouble and should have stopped her car, and, having failed to exercise ordinary care for her own safety, she was guilty of contributory negligence; that appellant had a blow out which he could not have

inflated properly. The automobile dealer, who sold the car to appellant, saw it the day following the accident at a garage in W. Olive. The right tire was down and he looked at it, and it was blown out. There was also testimony tending to show that there was no car 50 to 75 feet in front of Mrs. Loggman at the time of the accident.

On re-direct-examination Mrs. Loggman denied she had told appellant that her husband was late in bringing the car and that, if he had not been late, the accident would not have happened; and she also denied having any conversation with him about the accident. A nurse, who attended Mrs. Loggman when she was in the hospital, testified that she took her into the room occupied by Mr. Christoff and was there all of the time Mrs. Loggman was in the room, that she heard the conversation between them, and that Mrs. Loggman and herself and a patient in the other bed in the room were present, and Mr. Christoff was there in his bed; that Mrs. Loggman did not tell appellant that her husband was an hour late and that, if he had not been the accident would not have happened; that Mrs. Loggman did not tell appellant that she never would forget when his car came across the road, that he had both hands gripped on the steering wheel and his face looked frantic; that Mrs. Loggman did not tell appellant that she saw that he had lost control of the car but she could not stop, that she broke her ankle stepping on the brake. Appellant takes the position that the road was straight and clear of cars for a long distance, that appellant was driving fast and that there was no car ahead of her 50 to 75 feet, or more, from the scene of the accident, to contend for a vision of the approaching car, and that appellant must have seen that Loggman was in trouble and should have stopped her car, and, having failed to do so, ordinary care for her own safety, she was duty bound to stop, and that appellant had a blow out which he could not have

forseen and was not guilty of negligence which was the proximate cause of the injury to appellee; and that appellant made out a perfect case of accident and, because of the injury being purely accidental, no recovery could be had.

The evidence was conflicting, and the jury saw and heard the witnesses testify and it was their province to determine the facts in the case. Appellant testified that he had a blow out which was the cause of the accident; and as to when the blow out occurred, whether before or at the time of the accident, was for the jury to determine.

The evidence shows that the right rear fender of the Oldsmobile was jammed down upon the tire and the tire was cut in two places. Appellant was contradicted both by appellee and the nurse who took Mrs. Fogelman into his room, and who was there during all of the time that she was in the room at the hospital. We are of opinion that the verdict of the jury was not contrary to the manifest weight of the evidence.

Appellant contends that the court committed reversible error in refusing to give his instructions, numbered 2,3,4 and 5, offered on the theory of an accident on his part, and applying the rules of law concerning accidents to the facts disclosed by the record, when no other instruction was given on this theory of the defense.

The instructions while worded somewhat differently informed the jury that if the collision was unavoidable, so far as the defendant was concerned, or that if they believed from the evidence that the right rear tire on appellant's automobile blew out about 175 feet from the place of the accident and that the accident would not have happened except for the blow out, or that the accident was not in any manner due to the negligence on the part of appellant but was an unavoidable accident, so far as he was concerned, then the jury should find the defendant not guilty. We are of opinion that

foreseen and was not guilty of negligence which was the proximate cause of the injury to appellee; and that appellee made out a perfect case of accident and, because of the injury being purely accidental, no recovery could be had.

The evidence was conflicting, and the jury was not bound by the witnesses testify and it was their province to determine the facts in the case. Appellant testified that he had a blow out which was the cause of the accident; and as to when the blow out occurred, whether before or at the time of the accident, was for the jury to determine.

The evidence shows that the right rear fender of the automobile was jammed down upon the tire and the tire was cut in two places. Appellant was contradicted both by appellee and the nurse who took Mrs. Coleman into his room, and who was there during all of the time that she was in the room at the hospital. As one of opinion that the verdict of the jury was not contrary to the manifest weight of the evidence.

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the court did not commit reversible error in refusing the instructions.

We quote one of the refused instructions: "The court instructs the jury that it is not every accident which makes a defendant liable for damages for a personal injury. If the accident is unavoidable so far as the defendant is concerned, then no liability is incurred by him, whether as a result of it a person is slightly or seriously injured, and if in this case the jury believes from all the evidence and under the instructions of the court that so far as the defendant is concerned, the injury to the plaintiff was unavoidable, then the jury should find the defendant, Steve Christoff, not guilty." We can only point out in a general way some of the defects in these instructions.

Each instruction is argumentative in form and each contain mere abstract propositions of law, without any direct application of it to the facts in the case, and they do not state the facts which the evidence fairly tends to prove and advise the jurors what rule of law shall be applied in reaching a verdict. *Woods v. C.B. & Q.R.R. Co.*, 306 Ill. 217, 137 N.E. 806.

Each of the instructions direct a verdict for the defendant. Where a court directs a verdict if the jury should find certain facts to be true, the instruction should embrace all the facts and conditions essential to such verdict. An instruction directing a verdict must necessarily leave to the jury all issues of fact necessary to authorize the verdict by such instruction directed. *The Ill. Iron & Metal Co. v. Weber*, 196 Ill. 526, 63 N.E. 1008; *Nat. Importing Co. v. Bear & Co.*, 324 Ill. 346, 155 N.E. 343.

All of the instructions except number 5 contain the word "accident" and do not qualify the word by informing the jury that it must be without the negligence of the defendant. In the case of *Paulsen v. McAvoy Brewing Co.*, 226 Ill. App. 605-616, it is said: "Some

the court did not commit reversible error in refusing the instructions.

The court instructed the jury that it is not every accident which makes a defendant liable for damages for a personal injury. If the accident is unavoidable so far as the defendant is concerned, then no liability is incurred by him, whether as a result of it a person is slightly or seriously injured, and if in this case the jury believes from all the evidence and under the instructions of the court that so far as the defendant is concerned, the injury to the plaintiff was unavoidable, then the jury should find the defendant, "not guilty." We can only point out in a general way some of the defects in these instructions.

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Each of the instructions direct a verdict for the defendant. Where a court directs a verdict the jury should find certain facts to be true, the instruction should embrace all the facts and conditions essential to such verdict. An instruction directing a verdict must necessarily leave to the jury all facts of fact necessary to authorizing the verdict by such instruction directed. *The Ill. Iron & Metal Co. v. Weber*, 136 Ill. 586, 23 N.E. 1008; *Walt. Importing Co. v. Bear & Co.*, 324 Ill. 724, 155 N.E. 744.

All of the instructions except number 3 contain the word "guilty" and do not qualify the word by informing the jury that it must be without the negligence of the defendant. In the case of *Walt. Importing Co. v. Bear & Co.*, 324 Ill. 724, 155 N.E. 744.

courts have held that the words 'mere accident' are to be understood as excluding negligence or carelessness. In this State, however the decisions seem quite definitely to hold that the word "accident" or the phrase 'mere accident', if used in an instruction upon the subject of negligence, connotes something more than that which is unexpected and unavoidable and without fault or blame, and, accordingly, should always be qualified so as to exclude the attribute of negligence."

The word "unavoidable" and the phrase "unavoidable accident" as used in some of these instructions would be very apt to convey to the minds of the jurors that what occurred at the time of the collision and immediately prior thereto was what was referred to as "unavoidable" and "unavoidable accident", but under the record in this case to find that the accident was unavoidable the jury would have to consider the testimony as to the condition of the tire in use by appellant that he testified blew out and find that he was not negligent in using the same.

The instructions are misleading in not informing the jury it was their duty in determining whether the accident was unavoidable to find from the evidence that the defendant was not guilty of negligence.

The office of instructions is to give information to the jury concerning the law of the case for immediate application to the subject matter before them. The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions. *Reitvz v. Chicago Rapid Transit Co.*, 327 Ill. 207-213; 158 N.E.380.

Instruction number six given on behalf of appellant cured any

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as excluding negligence or carelessness. In this State, however, the decisions seem quite definitely to hold that the word 'accident' or the phrase 'mere accident', if used in an instruction upon the subject of negligence, connotes something more than that which is unexpected and unavoidable and without fault or blame, and, secondly, should always be qualified so as to exclude the attribute of negligence."

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Instruction number six given on behalf of appellant cannot any

error that the court might have committed in refusing his instructions numbered 2-3-4 and 5, and is as follows:

"The court instructs the jury that it is not sufficient to entitle the plaintiff to recover in this case for her to show any negligent breach of duty on the part of the defendant, but it devolves upon the plaintiff to further show that such breach of duty was the proximate or immediate or real cause of the injury to plaintiff; that in no case can a recovery be had for the negligent breach of duty unless the evidence shows that such negligent breach of duty was the proximate, immediate or real cause of the injury occurring. And you are further instructed that if you believe the right rear tire on defendant's car blew out and that the defendant, exercising the care and caution of a reasonable person, had no reason to expect said tire to blow out; and if you further believe from the evidence that the blowing out of the tire was the proximate, immediate or real cause of the injury, then you should find the defendant not guilty."

The court did not commit reversible error in refusing the instructions which appellant contends should have been given.

Appellant also contends that plaintiff's instruction on the measure of damages was erroneous; that the complaint alleged that she had become sick, sore, lame and disordered and was compelled to pay out large sums of money in endeavoring to become healed and cured, and offered proof of the amount of her medical bills and also offered proof as to the usual and customary charges for nursing services; that this instruction told the jury that, to enable them to estimate the amount of damages sustained by plaintiff, it was not necessary that any witness should have expressed an opinion as to the amount of such damages; that this instruction was good as to the physical injury, but the complaint charged that plaintiff had been forced to expend a large sum of money in being cured and such elements were capable of pecuniary measurement and it was necessary that the amount be proven and that, as to such allegation, the instruction was erroneous.

The jury were told by an instruction, given on behalf of the defendant, that it is not necessary that any witness express an opinion as to the amount of such damages, but that the jury might make such estimate from the facts and circumstances in proof. In

error that the court might have committed in favor of the defendant.
tions numbered 2-3-4 and 5, and it is as follows:

"The court further finds that it is not necessary to
attribute the plaintiff's recovery in this case to any
any negligent breach of duty on the part of the defendant, and
it devolves upon the plaintiff to establish that such breach
of duty was the proximate or legal cause of the injury.
jury to determine; that in no case can a recovery be had for
the negligent breach of duty unless the evidence shows that such
negligent breach of duty was the proximate, immediate or legal
cause of the injury occurring, and that the defendant's
that it is not the duty of the defendant to insure a safe
out and that the defendant, exercising the care and attention of a
reasonable person, had no reason to expect that the injury
and it is further held that the defendant is not liable for the injury
out of this was the proximate, immediate or legal cause of
the injury, then you should find for defendant of a jury."

The court did not commit reversible error in stating the in-

structions which appellant contends should have been given.

Appellant also contends that plaintiff's instruction on the

measure of damages was erroneous; that the complaint alleged that

she had become rich, some, fame and disreputable and was compelled to

pay out large sums of money in endeavoring to become wealthy and

cured, and offered proof of the amount of her medical bills and also

offered proof as to the actual and customary charges for nursing her-

VICES; that this instruction told the jury that, in making time to

estimate the amount of damages sustained by plaintiff, it was not

necessary that any witness should have expressed an opinion as to

the amount of such damages; that this instruction was good as to

the physical injury, but the court also found that plaintiff had

been forced to expend a large sum of money in being cured and such

elements were capable of pecuniary measurement and it was necessary

that the amount be proven and that, as to such allegations, the in-

struction was erroneous.

The jury were told by an instruction, given on behalf of the

defendant, that it is not necessary that any witness express an op-

inion as to the amount of such damages, but that the jury might

make such estimate from the facts and circumstances in proof. In

his counter-claim he asked damages for his pain and suffering, and charged that he had laid out large sums of money in endeavoring to be cured. Under this state of the record appellant is not in a position to criticize the instruction given on behalf of appellee.

While it is true that appellee offered evidence as to sums of money paid out and expended by her in endeavoring to be cured, by the introduction of Exhibits A to K, inclusive, yet these exhibits were all withdrawn. There remained in the record the testimony of Dr. Sihler, Jr., as to his services and the amount due him.

This instruction among other things informs the jury that in determining the amount of damages which plaintiff is entitled to recover they should take into consideration all evidence pertaining to the physical injuries sustained by her and all money expended by her for doctor bills or for which she became liable, and find for her such sums as in the judgment of the jury under the evidence and instructions of the court will be a fair compensation for the injuries she has sustained and that to enable them to estimate the amount of damages it is not necessary that any witness should have expressed an opinion as to the amount thereof, but the jury themselves may make such estimate from the facts and circumstances in proof.

Under this instruction the jury in estimating the damages must take into consideration the facts and circumstances in proof and if any amount is included for money expended for doctor bills paid or for which the plaintiff became liable, the jury necessarily would take into consideration the evidence bearing upon that question.

Appellant also complains because the witness Barrow, in describing the damage done to the car of appellee, testified among other things that the speedometer was locked between 25 and 35 miles per hour, and that the court over the objection of appellant permitted the answer to stand. No reversible error was committed by the court in so ruling

his counter-claim he asked damages for his pain and suffering, and charged that he had paid out large sums of money in endeavoring to cure. Under this state of the record appellant is not in a position to criticize the instruction given on behalf of appellee.

While it is true that appellee offered evidence as to how much money paid out and expended by her in endeavoring to be cured, by the instruction of the trial judge, it is not necessary that there should have been all withdrawn. There remained in the record the testimony of Dr. Fisher, Jr., as to the nature and extent of the injury.

This instruction among other things instructs the jury in determining the amount of damages which plaintiff is entitled to recover they should take into consideration all evidence pertaining to the physical injuries sustained by her and all money expended by her for doctor bills or for such other medical bills, and find for her such sum as in the judgment of the jury under the evidence and instructions of the court will be a fair compensation for the injuries she has sustained and that to enable them to estimate the amount of damages it is not necessary that any witness should have expressed an opinion as to the amount thereof, but the jury themselves may make such estimate from the facts and circumstances in proof.

Under this instruction the jury in estimating the damages must take into consideration the facts and circumstances in proof and if any amount is included for money expended for doctor bills paid on for which the plaintiff became liable, the jury necessarily would take into consideration the evidence bearing upon that question.

Appellant also complains because the witness Henry, in describing the damage done to the ear of appellee, testified among other things that the speechmaker was located between 25 and 30 miles per hour, and that the court over the objection of appellee permitted the answer to stand. He nevertheless states and admitted by the

court in to ruling

It is also objected that the court permitted appellee to step over to the jury and exhibit to them just where the scars on her face were. The court permitted her to point out where she was injured.

Under the law appellee could not recover damages for any disfigurement or marring of her personal appearance. The pointing out of where she was injured while it might call attention to the fact that her personal appearance was disfigured and marred by such scars, yet we are of opinion, considering the entire record in the case, that the verdict of the jury ought not to be disturbed because the court in its discretion permitted the plaintiff to point out just where the scars on her face were.

For the reasons set forth in this opinion the judgment of the Circuit Court of Montgomery County is affirmed.

Affirmed.

Opinion modified and petition for rehearing denied.

It is also objected that the same person should not be called to the stand to give evidence in two different cases. The court has held that this is not a valid objection. The court has held that the same person may be called to the stand to give evidence in two different cases. The court has held that the same person may be called to the stand to give evidence in two different cases.

Under the law applied in this case, the court has held that the same person may be called to the stand to give evidence in two different cases. The court has held that the same person may be called to the stand to give evidence in two different cases. The court has held that the same person may be called to the stand to give evidence in two different cases. The court has held that the same person may be called to the stand to give evidence in two different cases. The court has held that the same person may be called to the stand to give evidence in two different cases.

For the reasons set forth in this opinion, the judgment of the circuit court of Montgomery County is affirmed.

Affirmed.

Opinion written and delivered by the court.

Abstract

Opinion filed April 16, 1937
Rehearing denied Sept 5, 1937
modified opinion
rehearing denied

PUBLISHED IN ABSTRACT

Arthur L. Fogelman, as Administrator of the Estate
of Madeline Fogelman, Deceased, Substituted
Plaintiff-Appellee, v. Steve Christoff,
Defendant-Appellant.

Appeal from the Circuit Court of Montgomery County.

JANUARY TERM, A. D. 1937.

Gen. No. 9005

Agenda No. 5

MR. JUSTICE DAVIS delivered the opinion of the Court.

Madeline Fogelman in her life time recovered a judgment for \$4,000.00 upon the verdict of a jury, against Steve Christoff, the defendant, in the Circuit Court of Montgomery County, Illinois, from which judgment appellant took this appeal. The death of Madeline Fogelman, plaintiff-appellee, was suggested and Arthur L. Fogelman, Administrator of the Estate of Madeline Fogelman, Deceased, was substituted as plaintiff-appellee in said cause in this court.

She alleges in her complaint that on or about February 5, 1935, she was driving a 1934 Chevrolet truck delivery car in a southerly direction on U. S. Route 66, about two and one-half miles south of Litchfield, Illinois; that the defendant, Steve Christoff, was driving a certain other motor vehicle in a northerly direction upon said Route 66 and not regarding his duty in the premises he so carelessly and negligently drove and operated his automobile that by means thereof said automobile of defendant collided with the automobile driven by plaintiff and, as a result thereof, the plaintiff was greatly injured both internally and externally.

The answer of defendant admits he was driving an automobile at the place charged in the complaint, but denies that plaintiff was in the exercise of due care for her own safety and denies that he disregarded any duty in the premises; denies that he carelessly and negligently drove and operated his automobile or that he was guilty of any negligence.

By leave of court, obtained more than five months after the filing of his answer, the defendant filed a counter-claim in which he charged that the plaintiff

tiff, have duly performed all the conditions of said policy on their part to be performed by them." Defendant's

so carelessly and negligently drove and managed said delivery truck that by and through such conduct the plaintiff ran into and struck with great force and violence the sedan which the defendant was driving and greatly injured him. In count two of his counter-claim the defendant charged that at the time there were no other vehicles on the highway; that he was driving in a northerly direction and that plaintiff was driving in a southerly direction towards defendant; that, about 300 or 400 feet south of where the two automobiles came in contact with each other, the right rear tire of his automobile had a blow out and thereby caused it to lose its balance and equilibrium and became difficult to control; that at a point 1,000 or 1,200 feet north of where the impact of the cars occurred the plaintiff saw defendant was having great difficulty to control his car, and when plaintiff saw defendant's car was out of balance and equilibrium it became and was her duty to stop the truck she was driving, but disregarding her duty she negligently continued to drive towards and against the automobile of the defendant.

In her answer to the counter-claim plaintiff denied all of the charges of negligence, and denied that the right rear tire on defendant's automobile had a blow out, thereby causing it to lose its balance, and denied that at a point 1,000 to 1,200 feet north of where the impact of the cars occurred she saw that defendant was having difficulty in controlling his car.

Upon a trial of said cause the jury returned a verdict for plaintiff in the sum of \$4,000.00, upon which judgment was rendered.

Appellant alleged, as grounds for reversal of said judgment, that the court erred in denying his motion for a directed verdict at the close of plaintiff's evidence and again at the close of all of the evidence, and in refusing the instructions accompanying said motions; that the court refused to admit proper evidence and admitted improper evidence for plaintiff over the objection of defendant; that the verdict of the jury is contrary to the evidence and that the court improperly gave instruction No. 5 for plaintiff and improperly refused to give defendant's instructions 2, 3, 4 and 5.

At the close of the plaintiff's evidence and again at the close of all of the evidence appellant moved the court to direct a verdict in his favor, which motions the court denied and marked the instructions accompanying said motions "refused." Counsel for appellant argues at great length that the trial court should

have directed a verdict against the plaintiff because the record shows that she was guilty of contributory negligence and therefore could not recover as a matter of law. A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the testimony demurred to, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of plaintiff. *McCune v. Reynolds*, 288 Ill. 188, 123 N. E. 317: It is not the province of the trial judge on such motion to weigh the evidence and determine where the preponderance is. Neither the trial court in the first instance nor the court of review has anything to do with the question of the preponderance of the evidence or the credibility of the witnesses, when considering this question. *Geiger v. Geiger*, 247 Ill. 629, 93 N. E. 314.

"The question of law presented to the court upon a motion at the close of all of the evidence is whether, when all of the evidence is considered, together with all reasonable inferences from it in its most favorable aspect to the party against whom the motion is directed, there is a total failure to prove a necessary element of his case." *Nelson v. Stutz, Chicago Factory Branch, Inc.*, 341 Ill. 387, 173 N. E. 394. One of the necessary elements being that the plaintiff was in the exercise of ordinary care when the injury was received.

While the burden of proof is always on the plaintiff, in proceedings of this kind, to show that immediately prior thereto and at the time when the injury was received he was in the exercise of ordinary care, that question is one of fact, which must be determined by the circumstances attending and surrounding the injury. Whether the evidence tends to prove such care is a question of law. A court can only determine adversely to the plaintiff when no other conclusion can be reasonably drawn from the uncontradicted facts and from the evidence that is favorable to the plaintiff. *Pienta v. Chicago City Ry. Co.*, 284 Ill. 246; 120 N. E. 1.

There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety of circumstances which constantly arise it is impossible to announce such rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances. *Stack, Admr., v. East St. L. & Sub. Ry. Co.*, 245 Ill. 308; 92 N. E. 241.

Subscription price, Five Dollars per Annum in Advance. Single Copies, Fifteen Cents.
Entered as Second-Class Matter, October 3, 1917, under Post Office No. 363, Post Office at Chicago, Ill., under special permission of Post Office Department. Acceptance for mailing at special rate of postage provided for in Act of October 3, 1917, authorized on July 16, 1918.
Postage paid at Chicago, Ill.

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We are of opinion from the evidence in the record that the question of contributory negligence was properly submitted to the jury.

Counsel for appellant insist that the trial court should have directed a verdict against the plaintiff and submitted the case to the jury on the defendant's counter-claim. It is apparent that under the record in this case the trial court was without authority to direct a verdict against the plaintiff.

It appears that appellee left Litchfield on February 5, 1935, about 2:00 p. m., to visit her mother at Beuld, going south on U. S. Route 66. She stopped at Rut's corner for a cup of coffee, after which she started south down the road; at Monke's crossing she passed a truck about a mile from where the accident happened, driving at the rate of 35 or 40 miles per hour, after which she slowed down to 35 miles per hour. At quite a distance she saw a car coming towards her, and there was a car ahead of her about 75 or 80 feet; as she got about to the crossing the first thing she knew the car coming from the south just seemed to fly right in front of her, and she tried to stop and applied the brakes; the driver of the car, when it came across in front of her, had his hand up and just seemed to be going wild; she was on the west side of the road; the next she remembered some people were assisting her; she was driving a Chevrolet delivery sedan. She did not see appellant's car get off of the slab on either side before the accident. He was coming straight up the road and the car was weaving. She saw defendant's car headed in her direction just long enough to get across the road; her car probably traveled twenty feet from the time appellant's car crossed the black line until the collision occurred. The Oldsmobile was headed towards the ditch on the left side of the road, going north. The truck had jammed into the car. Back of the truck was a plain skidding mark where the tires had slid for a distance of ten feet. They were straight with the road. An automobile mechanic and garage operator hooked onto the Chevrolet to move the cars and found the brakes set, he released them and pulled the cars apart. There were skidding marks behind the Chevrolet, when he tried to move it. The speedometer was locked between 25 and 30 miles per hour. The right rear fender of the Oldsmobile was pushed down. It was against the tire, and the tire was cut in two places. The Oldsmobile had been off of the concrete on the east side of the road and the driver was trying to get back on the slab.

The evidence of the defendant discloses that he purchased his car on November 15, 1934, and had driven it about 2200 miles. It was equipped with 4 ply U. S. cord tires. On the day in question he was driving to Litchfield, and, as he got to Monke's crossing, he testified that the right rear tire on his car blew out and his car started swaying. He stepped on the brake and turned the car to the left side of the road and pulled to the right side and went a ways off of the road on the right side and back on the road; tried to right it the best he could and when he got about 150 to 175 feet from where the tire had blown out he got crosswise of the highway and swung in front of her car and there was a crash and Mrs. Fogelman drove into him. He had passed a car going towards Mt. Olive about a quarter of a mile before he reached the place of the accident. Appellant testified that Mrs. Fogelman visited him while he was in the hospital, came in a wheel chair; with reference to her husband, she said she was waiting for the car and was going to see her mother at Benld and had to wait until her husband came with the car, and he was about an hour late. I asked her, why didn't she try to stop before she hit me? She said that is how she broke her ankle, stepping on the brake trying to stop. The tires on his car did not show wear and had never been repaired and were inflated properly. The automobile dealer, who sold the car to appellant, saw it the day following the accident at a garage in Mt. Olive. The right tire was down and he looked at it, and it was "blowed" out. There was also testimony tending to show that there was no car 50 to 75 feet in front of Mrs. Fogelman at the time of the accident.

On re-direct-examination Mrs. Fogelman denied she had told appellant that her husband was late in bringing the car and that, if he had not been late, the accident would not have happened; and she also denied having any conversation with him about the accident.

A nurse, who attended Mrs. Fogelman when she was in the hospital, testified that she took her into the room occupied by Mr. Christoff and was there all of the time Mrs. Fogelman was in the room, that she heard the conversation between them, and that Mrs. Fogelman and herself and a patient in the other bed in the room were present, and Mrs. Christoff was there in his bed; that Mrs. Fogelman did not tell appellant that her husband was an hour late and that, if he had not been, the accident would not have happened; that Mrs. Fogelman did not tell appellant that

she would never forget when his car came across the road, that he had both hands gripped on the steering wheel and his face looked tragic; that Mrs. Fogelman did not tell appellant that she saw that he had lost control of the car but she could not stop, that she broke her ankle stepping on the brake.

Appellant takes the position that the road was straight and clear of cars for a long distance, that appellee was driving fast and that there was no car ahead of her 75 or 80 feet, or more, near the scene of the accident, to obscure her vision of the approaching car, and that appellee must have seen that appellant was in trouble and should have stopped her car, and, having failed to exercise ordinary care for her own safety, she was guilty of contributory negligence; that appellant had a blow out which he could not have foreseen and was not guilty of negligence which was the proximate cause of the injury to appellee; and that appellant made out a perfect case of accident and, because of the injury being purely accidental, no recovery could be had.

The evidence was conflicting, and the jury saw and heard the witnesses testify and it was their province to determine the facts in the case. Appellant testified that he had a blow out which was the cause of the accident; and as to when the blow out occurred, whether before or at the time of the accident was for the jury to determine.

The evidence shows that the right rear fender of the Oldsmobile was jammed down upon the tire and the tire was cut in two places. Appellant was contradicted both by appellee and the nurse who took Mrs. Fogelman into his room, and who was there during all of the time that she was in the room at the hospital. We are of opinion that the verdict of the jury was not contrary to the manifest weight of the evidence.

Appellant contends that the court committed reversible error in refusing to give his instructions, numbered 2, 3, 4 and 5, offered on the theory of an accident on his part, and applying the rules of law concerning accidents to the facts disclosed by the record, when no other instruction was given on this theory of the defense.

The instructions while worded somewhat differently informed the jury that if the collision was unavoidable, so far as the defendant was concerned, or that if they believed from the evidence that the right rear tire on appellant's automobile blew out about 175 feet from the place of the accident and that the accident would not have happened except for the blow out, or

that the accident was not in any manner due to the negligence on the part of appellant but was an unavoidable accident, so far as he was concerned, then the jury should find the defendant not guilty. We are of opinion that the court did not commit reversible error in refusing the instructions.

We quote one of the refused instructions. "The court instructs the jury that it is not every accident which makes a defendant liable for damages for a personal injury. If the accident is unavoidable so far as the defendant is concerned, then no liability is incurred by him, whether as a result of it a person is slightly or seriously injured, and if in this case the jury believes from all the evidence and under the instructions of the court that so far as the defendant is concerned, the injury to the plaintiff was unavoidable, then the jury should find the defendant, Steve Christoff, not guilty." We can only point out in a general way some of the defects in these instructions.

Each instruction is argumentative in form and each contain mere abstract propositions of law, without any direct application of it to the facts in the case, and they do not state the facts which the evidence fairly tends to prove and advise the jurors what rule of law shall be applied in reaching a verdict. *Woods v. C. B. & Q. R. R. Co.*, 306 Ill. 217, 137 N. E. 806.

Each of the instructions direct a verdict for the defendant. Where a court directs a verdict if the jury should find certain facts to be true, the instruction should embrace all the facts and conditions essential to such verdict. An instruction directing a verdict must necessarily leave to the jury all issues of fact necessary to authorize the verdict by such instruction directed. *The Ill. Iron & Metal Co. v. Weber*, 196 Ill. 526; 63 N. E. 1008; *Nat. Importing Co. v. Bear & Co.*, 324 Ill. 346; 155 N. E. 343.

All of the instructions except number 5 contain the word "accident" and do not qualify the word by informing the jury that it must be without the negligence of the defendant. In the case of *Paulsen v. McAvoy Brewing Co.*, 226 Ill. App. 605-616, it is said: "Some courts have held that the words 'mere accident' are to be understood as excluding negligence or carelessness. In this State, however, the decisions seem quite definitely to hold that the word 'accident' or the phrase 'mere accident,' if used in an instruction upon the subject of negligence, connotes something more than that which is unexpected and unavoidable and without fault or blame, and, accordingly,

should always be qualified so as to exclude the attribute of negligence."

The word "unavoidable" and the phrase "unavoidable accident" as used in some of these instructions would be very apt to convey to the minds of the jurors that what occurred at the time of the collision and immediately prior thereto was what was referred to as "unavoidable" and "unavoidable accident," but under the record in this case to find that the accident was unavoidable the jury would have to consider the testimony as to the condition of the tire in use by appellant that he testified blew out and find that he was not negligent in using the same.

The instructions are misleading in not informing the jury it was their duty in determining whether the accident was unavoidable to find from the evidence that the defendant was not guilty of negligence.

The office of instructions is to give information to the jury concerning the law of the case for immediate application to the subject matter before them. The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions. *Reitz v. Chicago Rapid Transit Co.*, 327 Ill. 207-213; 158 N. E. 380.

Instruction number six given on behalf of appellant cured any error that the court might have committed in refusing his instructions numbered 2-3-4 and 5, and is as follows:

"The court instructs the jury that it is not sufficient to entitle the plaintiff to recover in this case for her to show any negligent breach of duty on the part of the defendant, but it devolves upon the plaintiff to further show that such breach of duty was the proximate or immediate or real cause of the injury to plaintiff; that in no case can a recovery be had for the negligent breach of duty unless the evidence shows that such negligent breach of duty was the proximate, immediate or real cause of the injury occurring. And you are further instructed that if you believe the right rear tire on defendant's car blew out and that the defendant, exercising the care and caution of a reasonable person, had no reason to expect said tire to blow out; and if you further believe from the evidence that the blowing out of the tire was the proximate, immediate or real cause of the in-

jury, then you should find the defendant not guilty."

The court did not commit reversible error in refusing the instructions which appellant contends should have been given.

Appellant says: "But, independent of this question, the record contains another error for which the judgment must be reversed. Appellant requested the court to give to the jury the following instruction:

'If the jury believe from the evidence that the alleged injury was accidental and that neither the plaintiff nor the defendant was negligent, the jury should find the defendant not guilty.'"

We have searched the abstract and the transcript of the record itself and fail to find where such instruction was requested by appellant. For this reason the question is not before us for determination.

Appellant also contends that plaintiff's instruction on the measure of damages was erroneous; that the complaint alleged that she had become sick, sore, lame and disordered and was compelled to pay out large sums of money in endeavoring to become healed and cured, and offered proof of the amount of her medical bills and also offered proof as to the usual and customary charges for nursing services; that this instruction told the jury that, to enable them to estimate the amount of damages sustained by plaintiff, it was not necessary that any witness should have expressed an opinion as to the amount of such damages; that this instruction was good as to the physical injury, but the complaint charged that plaintiff had been forced to expend a large sum of money in being cured and such elements were capable of pecuniary measurement and it was necessary that the amount be proven and that, as to such allegation, the instruction was erroneous.

The jury were told by an instruction, given on behalf of the defendant, that it is not necessary that any witness express an opinion as to the amount of such damages, but that the jury might make such estimate from the facts and circumstances in proof. In his counter-claim he asked damages for his pain and suffering, and charged that he had laid out large sums of money in endeavoring to be cured. Under this state of the record appellant is not in a position to criticize the instruction given on behalf of appellee.

While it is true that appellee offered evidence as to sums of money paid out and expended by her in endeavoring to be cured, by the introduction of Exhibits A to K, inclusive, yet these exhibits were all withdrawn. There remained in the record the testimony

of Dr. Sihler, Jr., as to his services and the amount due him.

This instruction among other things informs the jury that in determining the amount of damages which plaintiff is entitled to recover they should take into consideration all evidence pertaining to the physical injuries sustained by her and all money expended by her for doctor bills or for which she became liable, and find for her such sums as in the judgment of the jury under the evidence and instructions of the court will be a fair compensation for the injuries she has sustained and that to enable them to estimate the amount of damages it is not necessary that any witness should have expressed an opinion as to the amount thereof, but the jury themselves may make such estimate from the facts and circumstances in proof.

Under this instruction the jury in estimating the damages must take into consideration the facts and circumstances in proof and if any amount is included for money expended for doctor bills paid or for which the plaintiff became liable, the jury necessarily would take into consideration the evidence bearing upon that question.

Appellant also complains because the witness Barrow, in describing the damage done to the ear of appellee, testified among other things that the speedometer was locked between 25 and 35 miles per hour, and that the court over the objection of appellant permitted the answer to stand. No reversible error was committed by the court in so ruling.

It is also objected that the court permitted appellee to step over to the jury and exhibit to them just where the scars on her face were. The court permitted her to point out where she was injured.

Under the law appellee could not recover damages for any disfigurement or marring of her personal appearance. The pointing out of where she was injured while it might call attention to the fact that her personal appearance was disfigured and marred by such scars, yet we are of opinion, considering the entire record in the case, that the verdict of the jury ought not to be disturbed because the court in its discretion permitted the plaintiff to point out just where the scars on her face were.

For the reasons set forth in this opinion the judgment of the Circuit Court of Montgomery County is affirmed.

Affirmed.

(Thirteen pages in original opinion)

Abstract
Oregon filed 16. 1937
Rehearing denied - Oct 5-1937
PUBLISHED IN ABSTRACT

**Arnot Meek, Appellee, v. The Eldred Drainage and
Levee District, Appellant.**

Appeal from Circuit Court, Greene County.

291 I.A. 623

JANUARY TERM, A. D. 1937.

Gen. No. 9003

Agenda No. 4

MR. JUSTICE FULTON delivered the opinion of the Court.

This appeal was prosecuted to review a judgment of the Circuit Court of Greene County awarding the sum of \$2,050.00 to the Appellee, Arnot Meek, against The Eldred Drainage and Levee District, Appellant, for damages to growing crops resulting from the overflow from a Drainage Ditch constructed by Appellant.

The declaration consists of four counts, which in general terms, are almost identical with the declaration filed in a case formerly considered by this Court entitled *Farrow v. Eldred Drainage and Levee District*, reported in 268 Ill. App. 432. That declaration described in detail the organization of the Drainage District which is the Appellant in this case, together with the relation thereto of certain water courses, their location and effect upon the drainage ditch which is the subject of this controversy. The Plaintiff in that case owned lands adjoining the premises of Appellee in this case and the claim was for the loss of growing crops because of overflow. The first and third counts of the declaration in this case covers damages to growing crops during the years 1926 and 1927, because of the defective construction of a drainage ditch by Appellant adjoining the lands on which said crops were growing, the ditch having been constructed for the purpose of diverting the waters of Bushnell Creek, Hurricane Creek and Schaefer Creek. The two counts further allege and charge that the drainage ditch was not constructed of sufficient size and capacity to carry off the said waters, and as a result thereof the lands on which the said crops were growing became flooded and the crops damaged and destroyed.

The second and fourth counts charge that the Appellant failed to keep the drainage ditch in proper repair, and by reason of the negligence of Appellant in that respect the said drainage ditch filled up and would not carry the waters of said courses, and the same

were cast upon the lands of the Appellee, where said crops were growing and damaged and destroyed the same.

A plea of the general issue was filed and also a number of special pleas. Demurrers were sustained to all special pleas and the case went to trial before a jury upon the declaration and the plea of the general issue. The jury returned a verdict for Appellee for the sum of \$2,500.00, which on motion for new trial was reduced by remittitur of \$450.00 to the sum of \$2,050.00, for which amount judgment was entered.

The Appellant district was organized in the County Court of Greene County in the year 1909, and the report of the Engineer for the District shows that the levee proposed to be built was for the purpose of preventing the overflow of the high waters of the Illinois River and also diverting the waters which came from the hills and creeks which ran through the lands included in the boundaries of said district. The Engineer's report showed that the district comprised about 8,500 acres of land in the western part of Greene County adjacent to the Illinois River. In part the report stated as follows:

"There are a number of small streams which drain from the hills onto the lands which are proposed to be reclaimed. The waters from all of these streams are to be taken into channels and carried to the river, so that they will not overflow the lands proposed to be reclaimed, and this will avoid the necessity of pumping the hill waters. Following is a list of the principal streams, which will be drained to the North of the District: Bushnell Creek, 1,200 acres; Hurricane Creek, 6,400 acres.

All of the streams which emerge from the hills carry very small quantities of water except after heavy rains, or with the melting of the snows in the spring. They all overflow the lands and do not maintain channels through the bottom lands sufficient to carry the flood waters."

Under the plan adopted by said District a levee was constructed protecting the lands in the District from being submerged by waters of the Illinois River and also from overflow from the waters of the three creeks above named. Before the levee was constructed the water from these hill streams flowed across the lands of the District and emptied into the Illinois River. East of the lands embraced in the Levee District is a range of high bluffs which extend northerly and south-

erly. Land lying East of this range of bluffs is about the same elevation as the said bluffs. The land which the Appellee was farming was situated west of said range of bluffs, and east of and adjacent to the drainage ditch of the District. The levee was constructed on the west side of the ditch opposite from Appellee's lands at a height of from 12 to 15 feet above the level of the ground.

As a part of the scheme of drainage when said District was organized, an exterior ditch was provided for on the outside of the levee to carry the waters from Bushnell Creek, Hurricane Creek and Schafer Creek and the waters which naturally flowed upon the lands adjacent thereto. Bushnell Creek emerged from the bluff about one mile south of the land on which Appellee was farming and before the construction of the levee, flowed in a westerly and southwesterly direction. Hurricane Creek emerged on a line almost due east of the southerly line of the land farmed by Appellee and prior to the construction of the levee flowed in a westerly and southwesterly course across the lands of the district. Schafer Creek emerged from the bluffs about one mile north of the lands occupied by Appellee and flowed in a westerly and southwesterly direction across the lands of the district. In 1912, the Chicago and Alton Railroad extended its railroad line from the Village of Eldred west into said Drainage District, and constructed a fill through the lower lands on which the track was laid. The height of the railroad track was slightly lower than the levee of the drainage district. At the same time a ditch was dug on the south side of the railroad embankment connecting with Hurricane Creek as it came out of the bluff and extending to the point where the railroad crosses the levee. The exterior ditch of Appellant was constructed before the extension of said railroad into the district was made, and an opening was made in the railroad embankment immediately east of the levee to permit the waters carried by the exterior ditch to flow under said railroad track and on north in accordance with a plan devised when the ditch and levee were constructed. The railroad embankment was constructed along the south side of the lands occupied by Appellee as a tenant and is situated between said land and the channel of Hurricane Creek.

A Bill of Particulars was filed by the Appellee specifying the number of acres of standing corn which was destroyed and the number of acres damaged by over-

flow during the year of 1926 and also the number of acres of standing corn damaged in 1927, together with 15 acres of wheat and some clover seed destroyed in 1927. The Appellee testified that he leased the land of Beverly Farrow containing 556 acres on the 19th day of August, 1926, which includes the lands described in his declaration. He further testified that there was about 65 or 70 acres of corn growing on the land adjacent to the drainage ditch when he took possession and that he purchased this corn, which appeared to be in good condition, for the sum of \$30.00 per acre; that on the night of September 4th, 1926, the water from Hurricane and Bushnell Creeks overflowed this land and ruined the corn. His testimony also showed that 50 acres of the corn was totally destroyed and five or six more acres damaged about 40 or 50 per cent. He further testified that he planted about 25 acres of corn next to the drainage ditch on or about the 1st of July, 1927, and that in October of the same year the water from the creeks and drainage ditch overflowed the said land and caused damage to the standing corn of \$500.00; that he also had 15 acres of wheat about 40 rods east of the drainage ditch, which was sown in October, 1926; that in March or April, 1927, the water from the creeks damaged the wheat to the extent of \$300.00; that he also sowed two bushels of clover seed in the wheat during the month of February, 1927, and that just as the clover was well started it was killed by the overflow. There was further testimony concerning damage to 20 acres of corn in 1926 by the waters from Schafer Creek amounting to \$450.00, but on motion for new trial the Court held that it was error to deny the motion to exclude such evidence and ordered a remittitur concerning this item, which was consented to by Appellee so that this item is not in controversy. The Appellee also testified that he had 10 acres of standing corn in the field east of the Adellis Farrow land which was damaged by the waters from Schafer Creek in 1927 to the extent of \$200.00. The Appellee was corroborated as to the damage to the growing crops by George McFarland, a farm hand; Adellis Farrow, who lives on the land adjoining that occupied by Appellee; by Arthur Robley and Tom Wollenweber, neighbors of Appellee. J. H. Cordes, a Civil Engineer, and experienced in drainage work, testified that he had made a survey of the ditch and surrounding territory in January, 1928, and that from calculations made from standard rec-

ognized formulas the ditch constructed by Appellant did not have sufficient capacity to carry the waters from the diverted streams. There was also considerable testimony by Cordes, the Appellee, and others that the exterior ditch had filled up with dirt and debris and that willows were permitted to grow on its banks so that the flow of the water was seriously obstructed.

On behalf of Appellant, several witnesses testified that much of the corn which Appellee purchased in August, 1926, had been destroyed by the flood over such lands in June, 1926. Appellant also introduced the testimony of a number of other witnesses who testified that whatever damage there was to the crops of Appellee was caused by backwater from the Illinois River and not from overflow from the creeks or the drainage ditch. H. L. Caldwell, Engineer for the Appellant Drainage District, testified that in his opinion the ditch was sufficient size and capacity to carry the waters from the creeks above named.

The Appellant assigns numerous grounds for reversal of the judgment but in his final argument covers questions of fact only. However, we will discuss briefly the other points contained in his briefs. He first insists that the Court erred in refusing the Appellant's motion for a directed verdict at the close of the Plaintiff's testimony on the grounds that there was a variance between the allegations of the declaration and the proof. The averment, which it is claimed was not proven, was that the ditch caved in and it became out of repair. While it is a well established principle of law that the allegations of the declaration and the proof must both correspond for the purpose of specifically advising the opposite party of what he must answer, still the variance must be a substantial departure and tend to prove a different cause of action than the one averred. In this case the proof of the averment complained of was not essential to the right of recovery by the Appellee and such averments might have been wholly stricken from the declaration without in any way disturbing Appellee's cause of action. At the trial the Appellee's theory was to prove that the ditch, as originally constructed, did not have sufficient capacity to carry the waters. The second and fourth counts were based on the negligence of the Commissioners in permitting the drainage ditch to fill. The failure to prove the averment complained of was not fatal.

The claim of the Appellant that the Court erred in refusing to strike the testimony of the Appellee as to damage of wheat and loss of clover seed occurring in the spring of 1927 because it did not correspond to the allegations of the declaration or the Bill of Particulars is not supported by the record. The Appellant claims that the Bill of Particulars limited the proof of damages to crops in 1927 to the month of October of that year. An examination of the Bill of Particulars shows that Appellee claimed loss for wheat and clover seed in the year 1927 without specifying any date when the loss occurred.

The Appellant further urges that it was error for the Court to permit the Appellee, after the close of the Appellant's testimony, to amend his declaration to include the overflow from Hurricane Creek, Bushnell Creek and Schaefer Creek as well as from Appellant's drainage ditch and in denying Appellant's motion for a continuance to enable the Appellant to meet the allegations of the declaration as amended. The motion for continuance made by the Appellant was supported by an affidavit of F. A. Whiteside, the attorney for the Appellant District. The Court in denying the motion said that Appellant had had ample opportunity to produce evidence covering the overflow on said lands from the waters of Schaefer Creek and that the Court would afford the Appellant ample opportunity to produce any evidence it might see fit to meet such amendment.

Par. 1 of Sec. 46 of the Civil Practice Act, provides that amendments may be made at any time before final judgment in a civil action on such terms as are just and reasonable. Rule 14, Par. 4, adopted by the Supreme Court in 1935, provides as follows:

"No amendment shall be cause for continuance unless the party affected thereby, or his agent or attorneys, shall make affidavit that he is unprepared to proceed to or with the trial of the cause, and if the cause thereof is the want of material evidence, such continuance shall be granted only on such further showing as may be required for continuance for that cause."

In the case of *Ferrell v. So. Ill. Light & Power Co.*, 206 Ill. App. 169, the Court held:

"Where the original declaration charged that the defendant had, by the construction of its railway, prevented the escape of water naturally coming upon plaintiff's premises and the amendment

added the charge of diverting surface water out of the course of natural drainage and casting it upon plaintiff's premises, held that such amendment is germane to the original declaration, and the charges of negligence remained the same; the amendment added merely an additional element of injury."

We cannot see how any prejudice resulted to the Appellant by the granting of the amendment to the declaration and do not think the Appellant made the showing required by the rule of the Supreme Court in order to entitle it to a continuance. Nor do we believe that the Court abused its discretion in permitting the amendment to be made and in denying the motion for continuance.

The objections to the given and refused instructions do not point out any substantial error. The reading of the entire instructions show that the jury were fully instructed as to the law and measure of damages.

The entire argument of the Appellant was devoted to the questions of fact urging that the verdict was manifestly against the weight of the evidence and the result of misapprehension, prejudice or passion on the part of the jury. It is well established law in Illinois that a levee drainage district organized for agricultural purposes is liable for damage to and loss of crops on account of overflow from diverted water courses, where the evidence supports the verdict of a jury. *Farrow v. Eldred Drainage and Levee District*, 268 App. 432; *Bradbury v. Vandalia Drainage District*, 236 Ill. 36. In the latter case the Court said, on page 48:

"So far as appears, this district, with its scheme for a levee, was organized for the purpose of improving the lands within the district for agricultural purposes, which is not an exercise of police power, and it was organized upon the petition of a majority of the owners of lands in the belief that they would be benefited by the organization. To deny to the plaintiffs a recovery of the damages they have suffered by the efforts of the owners of lands within the district to benefit themselves would be against natural right and every sentiment of justice, and we find no sufficient reason for exempting the district from liability, whether the levee is regarded as a wrongful obstruction to the waters of the river or as a lawful one under the decree of the county court."

All of the questions of fact in this case were properly submitted to the jury, who saw the witnesses and heard their testimony and it was their sole and exclusive province to determine such questions. We believe in this case that the verdict of the jury was entirely supported by the evidence in the case and a reviewing Court would be entirely unwarranted in reversing a judgment on such verdict on any question of fact involved in the case.

The complaint of Appellant that the verdict of the jury was influenced by unnecessary remarks and the leaning of the trial Judge toward the side of the Appellee is not borne out by the record in the case.

For the reasons assigned the judgment of the trial Court is affirmed.

Affirmed.

(Nine pages in original opinion.)

Injunction filed April 16, 1937
Rehearing denied April 5, 1937
tract

PUBLISHED IN ABSTRACT

James Howat, et al., Appellants, v. International
Union United Mine Workers of America,
et al., Appellees.

Appeal from Circuit Court, Tazewell County.

Transferred from Supreme Court.

JANUARY TERM, A. D. 1937.

291 I.A. 623²

Gen. No. 9038

Agenda No. 12

PER CURIAM:

The Circuit Court of Tazewell County sustained a motion of the defendants, now appellees herein, to dismiss a complaint in equity filed by the plaintiff appellants and others, containing a prayer for injunction and relief, and thereupon entered an order dismissing the complaint for want of equity.

A verified complaint was originally filed by thirty-eight persons as individuals and as members of a local union of the Progressive Miners of America, an unincorporated voluntary organization, against the International Union United Mine Workers of America, an unincorporated voluntary organization and its subordinate branches and officers, and Fred Schaefer, Jr., the latter doing business as Pekin Mining Company, as codefendants.

It appears from the complaint that the individual plaintiffs had been employed as coal miners by the David Grant Coal Company at its mine in the vicinity of Pekin, Illinois, and were members of said Progressive Miners Union or association of coal miners, organized for the purpose of furthering and bettering the condition of employees engaged in the coal mining industry. The local union to which employees of the David Grant Mine then belonged was designated as Local District No. 25.

That on October 7, 1935, David Grant, who was then the owner and operator of the David Grant Mine, signed an agreement with said Union to which his employees belonged, wherein it was stated that David Grant, being an independent operator, was desirous of operating his mine or mines located at Pekin, Illinois, under a contract entered into and to become effective on October 1, 1935, and to expire on March 31, 1937,

between the Progressive Miners of America, District No. 1, State of Illinois, and the Coal Producers' Association of Illinois, under the wage scale as established by said alleged contract.

The complaint further alleges that the agreement fixed the rate of pay for miners in various districts, a wage scale for mechanical loading, division of work, charge for powder, price of coal to employees, and numerous other questions which might arise in the mining of coal, and that prior to March 4, 1936, David Grant operated the mine in accordance with the terms of the above mentioned contract.

On February 26, 1936, David Grant and Louisa Grant conveyed the premises upon which the Grant mine was located, with the underlying coal, mineral and mining rights, and equipment used in operating the mine, by warranty deed, to the defendant Fred Schaefer, Jr., of Pekin, Illinois. However, the possession of the mine was reserved by the grantors until March 4, 1936, at which time the defendant Schaefer, as such grantee, entered into possession and began operation of the mine under the name of Pekin Mining Company.

It is further alleged that after defendant Schaefer entered into possession of the coal mine and premises on March 4, 1936, he entered into a contract with defendant United Mine Workers of America by which he agreed to operate the coal mine with employees who were members of that union; that after the above mentioned change in ownership, four of the parties plaintiff herein were continued in the employment of the defendant Schaefer, and that on learning that he had entered into a contract with the United Mine Workers, they gave written notice to him of their membership in the Progressive Miners Union and of their desire to retain membership therein; that on April 13, 1936, a petition by a number of defendants was also served on the defendant Schaefer, in which they stated that they were desirous of continuing membership with the Progressive Mine Workers, and believed they had the right to bargain collectively through representatives of their own choosing, free from the interference, restraint, or coercion of the employers, and that no one seeking employment should be required, as a condition precedent, to join any company or union.

It is further alleged in substance that the defendant Fred Schaefer, Jr., was persuaded not to recognize the contract entered into by and between the David Grant Coal Company and the Progressive Miners by threats

of boycott, of interfering with his business, and of labor difficulties, which resulted in loss of property rights by plaintiffs as to employment in said mine, even though there had been a change of ownership, and that the right to continue such employment after transfer and change of ownership is an established custom and as such is recognized throughout the coal fields of Illinois.

The complaint further alleges that defendant Fred Schaefer, Jr., refused to give further employment to plaintiffs unless they agreed to work under the contract which he had entered into with the United Mine Workers; that an agent of the latter union threatened personal violence to an employee member of the plaintiff union, and that they were being deprived of their lawful rights to continue their employment and labor under the terms of the former contract between the Progressive miners and Grant, the former owner, hereinabove referred to.

They further alleged a conspiracy by defendants to interfere with their constitutional rights to membership and their right of collective bargaining by organizations and representatives of their own choosing and of their legal right to continue employment in said mine.

The complaint seeks in substance to restrain the defendants from interfering with, hindering, obstructing, or stopping the plaintiffs from unlawfully persuading any of the plaintiffs to take membership in a union not of their own choosing, or from interfering with any of the plaintiffs or their officers in rendering services and discharging their duties as employees of defendant Schaefer.

On April 30, 1936, the defendants filed their respective verified answers to the above complaint, in which they replied in substance that they disclaimed knowledge or information sufficient to form a belief as to truth of numerous allegations of the complaint and made specific denials of the truth of numerous other allegations therein.

On May 5, 1936, plaintiff William Howat and twenty-three others, by leave of Court, withdrew as plaintiffs in said cause and were dismissed from the suit. The answers of the defendants were thereupon also withdrawn and a motion to dismiss the complaint was, by leave of the Court, filed by the defendants. On June 17, 1936, this motion to dismiss the suit at the cost of the plaintiff was allowed, and upon such dismissal, the plaintiffs elected to abide by the allegations of their

complaint, and appeal from the ruling and decree entered by the Trial Court therein.

Appeal bond was given by the plaintiffs and the cause was appealed to the Supreme Court, and it appearing under the facts as alleged that no constitutional question was involved, the cause was transferred to this Court for hearing on such appeal.

The motion to dismiss alleges the insufficiency of the complaint in law, pleads in substance that the allegations of the complaint setting up alleged custom under which plaintiffs claimed that the assignee of defendant Grant Coal Company was bound to carry out the contract with David Grant Coal Company expiring on March 31, 1937, would undertake to create an agreement not to be performed within one year from the time of making thereof on March 4, 1936, when the coal properties changed hands, which was not in writing and therefore contravened the express provisions of the statute of frauds; that the alleged contract so relied upon was not binding upon the defendant grantee Schaefer, was without consideration, and was wanting in mutuality, and further alleged that the facts set forth in the complaint did not state a cause of action and prayed dismissal of the suit at cost of plaintiffs.

Although this action was decided upon the pleadings alone, the plaintiffs' counsel saw fit to abstract only part of the complaint, and failed to abstract exhibits one, two, and three, which were attached thereto and made a part of the complaint. The defendants filed an additional abstract containing many of the omitted portions of the complaint, and exhibits, but the Court has been compelled to read the record in order to enable it to arrive at a clear understanding of the issues in this case.

It appears from the record that the four former employees who gave notice of membership in plaintiff union and were re-employed by defendant Schaefer when he purchased the mine in question withdrew as plaintiffs in the court below on May 5, 1936, before the motion to dismiss was heard and sustained by the Court, and are therefore no longer parties to this suit. It is not claimed that any of the plaintiffs who are appellants herein were ever employed by defendant Schaefer after he purchased the mine.

It therefore follows that the argument of plaintiffs' counsel is based on the fallacious premise that the complaint shows a relationship of employer and em-

ployee, between the remaining individual plaintiffs and the defendant Schaefer, when as a matter of fact no such relationship is shown by the pleadings to exist.

No contract in writing was ever entered into between Schaefer and any of the plaintiffs who were in his employment. It is neither alleged nor claimed in the complaint that he orally agreed to continue any of the plaintiffs in his employment for any period of time, after he purchased the mine in question.

Even though defendant Schafer had verbally promised to recognize and assume the alleged agreement previously entered into between the David Grant Coal Company and the members of plaintiff union, the contract could not be specifically enforced against him, since a contract can never be so enforced by the Court unless it is mutual, and can be enforced by each of the parties against the other. Whenever from personal incapacity, the nature of the contract, or any other cause, it is incapable of being enforced against one party, that party cannot enforce it against the other. *Barker v. Hauberg*, 325 Ill., 538; *Rath v. Degener*, 352 id, 135. In contracts involving personal service if the facts so warrant, the plaintiff has his legal remedy and may be adequately compensated in damages in an action at law.

A verbal contract by defendant Schaefer to recognize and continue the previous written contract between plaintiffs and the David Grant Coal Company would contravene the express provisions of the statute of frauds, which provide "that no action shall be brought whereby to charge—any person upon any agreement that is not to be performed within the space of one year from the making thereof unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." Smith-Hurd Illinois Revised Statutes, 1935, Chap. 59, Sect. 1; Illinois State Bar Statutes, 1935, Chap. 59, Sect. 1.

Under the above express statutory provisions the Courts of this state have uniformly held that an employment contract not in writing is not enforceable unless entered into within one year before the time required for its completion. In the case of *Chadwick v. Morris and Co.* 170 Ill. App., 569, this Court held that an alleged agreement for a year's employment made on September 2 to begin in about ten days would be within the above provisions of the statute of frauds.

In the case of *Haynes v. Mason*, 30 Ill. App., 85, it was held that a verbal contract made on March 26 to work for one year, the year to commence on March 30, was not to be performed within the space of one year of the making thereof and was within the statute. See also *Washburn v. Hoxide Institute*, 249 Ill. App., 194. Defendant Schaefer took over and began the operation of the mine on March 4, 1936, hence a continuance of the employment of any of the plaintiffs under an alleged oral contract would not be binding since the same would not expire until March 31, 1937, more than one year thereafter.

The only plaintiffs who were employed by defendant Schaefer after the change of ownership and operation on March 4, 1936, voluntarily withdrew and were dismissed from this suit, hence there could be no force in the plaintiffs' contention in his brief that the above provision of the statute of frauds did not apply to plaintiffs because of part performance.

The plaintiffs claim that certain rights accrued to them by virtue of an alleged custom or usage, growing out of the agreement with the former owner of the mine in question, expiring March 31, 1937, for which rights they seek an equitable remedy by injunction. Plaintiffs contend that an established custom prevails in the coal mining industry in the coal fields of Illinois, which recognizes as property rights the miners' right to continue employment in a mine or mines, even though there has been a transfer of title and ownership to one who was not a party to the original contract. The motion to dismiss, for the purpose of pleading herein, admits the truth of this allegation. Conceding this to be an established and recognized custom throughout the coal fields of Illinois, such alleged custom, if so prevailing, could not in any way bind the defendant Schaefer to an implied contract to employ the defendants, which was not to be performed within one year and which therefor would be void as to him under the statute of frauds. Ill. Rev. Stat., *Supra*.

It is a well settled rule of law in this state that in order for a custom or usage to be binding, it is essential that it be a legal one, and that a custom will not be recognized which is contrary to established law. *Entwistle v. Henke*, 211 Ill., 275 (278); *Cold Storage Co. v. Produce Co.*, 197 id., 457; *Bissell v. Ryan*, 23 id., 517; *Young v. McKittrick*, 267 Ill. App. 267; 27 R. C. L., 164.

Disregarding all surplussage, it does not appear from the material allegations and recitals of the complaint that the alleged right to collective bargaining or mem-

bership in any union or organization by the parties hereto is in issue or is material to the issues in passing upon the respective rights of the parties under either the contract or alleged custom referred to in the complaint.

In view of what has been said, it is the holding of this Court that at the time the defendant Schaefer purchased and went into possession of the mine in question, he was under no legal contract or obligation to either the plaintiffs or the defendants as individuals or as an organization. It therefore necessarily follows that the defendants had equal rights with the plaintiffs to bargain and contract with the defendant Schaefer after he became the owner of the mine in question. When they bargained and attempted to contract with him, they were in no way interfering with the rights of the plaintiffs for the reason that the plaintiffs, under the facts alleged in the complaint, had no legal rights superior to those of the defendants.

The judgment of the Circuit Court will therefore be affirmed.

Judgment Affirmed.

(Eight pages in original opinion)

291 Ill App 623 (Abel)

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D., 1936

Term No. 25

Agenda No. 11

THELMA ENLOE
Plaintiff and Appellee

vs.

AMERICAN FAMILY
PROTECTION, INC.
Defendant and Appellant

APPEAL FROM
CIRCUIT COURT OF
BOND COUNTY

291 I.A. 623³

Murphy, J:

Plaintiff was a beneficiary in an insurance policy, known as a family policy, issued by the defendant, insuring the life of plaintiff and her husband, Harry Enloe. A trial with a jury resulted in a verdict and judgment for plaintiff for \$500. and this appeal is from that judgment.

Defendant contends that its motions for a directed verdict and judgment notwithstanding the verdict should have been allowed for the reason that the complaint did not sufficiently allege the furnishing of proof of death and that there is no evidence of proof of death having been given.

The allegation in the complaint in reference to giving notice of death and all other conditions is "That the said Harry Enloe during his lifetime and the plaintiff, have duly performed all the conditions of said policy on their part to be performed by them." Defendant's

answer contains a general denial of said allegation.

The policy provision was that payment would be made within sixty days after receipt of due proof of death.

Sub-section 3, Rule 13, of the Supreme Court Rules, provides that "in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied the facts must be alleged in connection with such denial showing wherein there was a failure to perform."

Under this rule plaintiff's general allegation of having performed all the conditions required to be performed by the insured and the plaintiff would include the condition that plaintiff was required to furnish defendant due proof and notice of death. If defendant wished to rely upon the defense that such condition had not been performed it would under Rule 13 be required to deny it by answer and allege facts showing wherein there was a failure to perform. Defendant's general denial was not in accordance with the requirements of Rule 13 and did not raise an issue on plaintiff's performance of the conditions precedent.

Defendant's further contention, that even though the general allegation of performance is deemed sufficient, yet plaintiff failed to make proof of notice of death requires consideration of Rule 13 in connection with Par. 2, Sec. 40, Civil Practice Act, Smith Hurd, Chapt. 110 Sec. 164, Par. 2 provides that every allegation, except allegations of damages, not explicitly denied shall be deemed to be admitted. Considering Par. 3, Rule 13, of the Supreme Court Rules in connection with this statutory provision, it would appear that defendant's failure to specifically allege facts showing wherein plaintiff

had failed to perform the conditions precedent would leave plaintiff's general allegation of performance of conditions untraversed and should stand as admitted by defendant.

Plaintiff did prove however, that her attorney had written a letter to the defendant which stated, "I am enclosing herewith proof of death of Harry Enloe duly certified by beneficiary together with statement of physician, death claim and certified copy of coroner's certificate of death." The proofs referred to in the letter were not offered in evidence. The policy made no provision as to how the notice and proof of death should be given and contained no provision that such should be made on blanks furnished by defendant. In *Anderson v. Inter-State Accident Ass'n.*, 354 Ill. 538, 546, the court said, "It may be stated as a general rule that sufficient proof of death is made by evidence in any form which is substantial and trustworthy enough to enable the insurer to form an intelligent estimate of his rights and liability under his contract, and any succinct and intelligent statement giving the information called for by the policy, whether verified or not or whether by eye-witnesses or not, in the absence of some policy or statutory requirement to the contrary, is sufficient to put the insurer upon inquiry to determine whether he is liable."

Defendant's final contention is that the insured concealed certain facts in making his application for insurance and that by reason of such fraudulent statement, the policy was void. The policy was issued May 20, 1935 and insured died Sept. 17, following, under circumstances indicating he suffered a heart attack. The policy provided that the application was to be a

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part of the contract of insurance. By the terms of the contract all statements made by the insured in his application for insurance were to be taken as representations and not as warranties.

The 12th question was, what injuries or illness or treatments by or consultations with physicians or practitioners have you or any of these applicants had during the last seven years. Answer, none. Dr. Cartmell, called by the defendant, testified that he treated Harry Enloe two or three times in January, 1935, for a severe cold and cough, "probably a symptom of influenza." The doctor prescribed for his ailment by giving him cough medicine.

There is a material and substantial difference between the legal effect of a warranty and a representation. A representation must relate to a material matter and it is only required to be substantially true while a warranty must be literally true and its materiality cannot be called in question. It is said that warranties enter into and are made a part of the contract while representations are merely inducements to it. *Minnesota Life Ins. Co. v. Link* 230 Ill. 273; *Commonly Ins. Co. v. Rogers*, supra; *Metropolitan Life Ins. Co. v. MorVec*, 214 Ill. 186.

The answers made by the insured in his application were representations and in *Minnesota Life Ins. Co. v. Link*, supra, the court said the appellant could not rest a defense upon such statements without averring and proving their materiality and that they were known to be false by the insured at the time they were made. It will be noted from Dr. Cartmell's testimony quoted above that he did not testify that the insured had influenza. He stated that it was merely a symptom. Defendant did not allege or prove that the answer the insured made to the 12th question was material to the risk assumed by it.

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are determined by the laws of the theory of the structure of the atom.

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The fifth part of the paper is devoted to a discussion of the general principles of the theory of the structure of the atom. It is shown that the structure of the atom is determined by the laws of quantum mechanics, and that the laws of quantum mechanics are determined by the laws of the theory of the structure of the atom.

In *Woodruff v. Mutual Life Ins. Co. of N. Y.* 229 Ill. App. 213, 219, the court said, "It is not unreasonable to assume, on the question of the misrepresentations claimed to have been fraudulently made by the insured, that for aught that appears in evidence, the insured, in failing to disclose the fact that he had an attack of acute indigestion and an attack of tonsillitis, and that he had had other temporary disorders before the time of his application for insurance, and the treatments and medicine which he had taken therefor from physicians, could very well have had the idea that the temporary disorders were not matters concerning which the insurance company wanted and required information."

There is evidence that Harry Enloe purchased aspirin tablets in large quantities and that he said they were for his own use. Plaintiff testified that her husband purchased aspirin tablets for her and that she used them.

There is no evidence that the insured, at anytime prior to the issuance of the policy, had any ailment other than the cold and cough referred to by Dr. Cartmell and the fact that he purchased aspirin or that he used it does not give rise to any presumption that he used it for any ailment that he then had, the existence of which was so material to defendant that he should have disclosed it by his answers in his application. The judgment of the Circuit Court is affirmed.

Judgment Affirmed.

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Illinois App. Abst. Opinion

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Illinois App. Abst. Opinion

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77730

This reserved book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Date

Name

Howard Davis

JUL 16 1963

Stewart Dorman

M. Lipp. Ct.

4/10/64 J. Sheridan 66-114

8/1/63 R. Blackman 332-1825

2/2/63 R. Blackman 332-1825

3-31-66 R. K. Larson FIG 4140

SEP 19 1965

R. H. Ableson 693-3331

G. Johnson 693-3331

J. H. Jones 330913

7/7/68 Daniel J. Emmitt 33005

2/4/70

DLA RA-6-664

DLA RA-6-6611

4/2/70 DLA RA-6611

7-24-70 G. G. G. 52-6490

10-7-70 G. G. G. 4030300

6/1/71 G. G. G. 641-2626

Borrower who signs this card is responsible for the return of the book.

Not Transferable.

Not to be taken from the Reading Room.

Sign legibly.

Obey these rules and avoid fines.

Date

Name

	A. L. [Signature]	
4-26-72	W. J. [Signature]	282-244
	Charles [Signature]	283-0272
	W. J. [Signature]	236-6655
5-21-78	[Signature]	11-4-1164
5-29	W. C. Murphy	008198
7-9	[Signature]	222-4751
5-27-78	K. [Signature]	576-7964
5-27-78	[Signature]	932-3340
5-26-78	E. [Signature]	346-5787
1-24-78	S. [Signature]	372-2000
6-14-78	D. [Signature]	793-5400
6-25-78	[Signature]	920-7190
3-7-83	R. S. [Signature]	236-5537

